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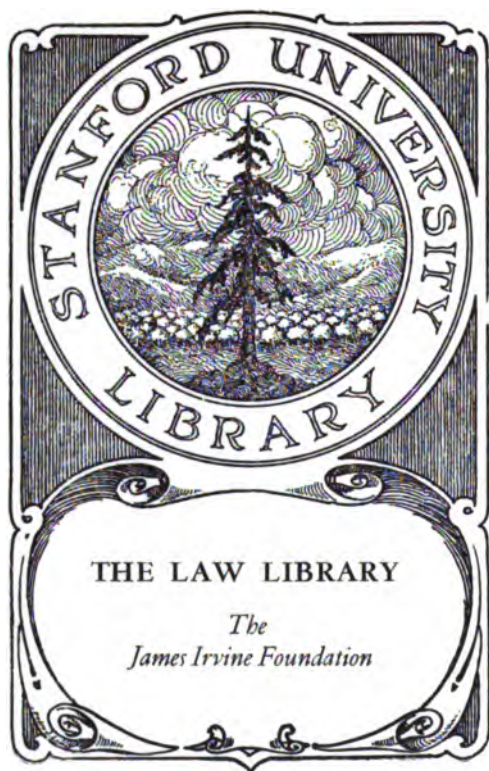
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A TREATISE
ON
THE LAW
OF
CIRCUMSTANTIAL EVIDENCE

ILLUSTRATED BY NUMEROUS CASES.

BY
ARTHUR P. WILL,
OF THE CHICAGO BAR.

PHILADELPHIA:
T. & J. W. JOHNSON & CO.,
1896.

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PREFACE.

A work on circumstantial evidence, prepared with especial reference to the needs of the American lawyer has long been called for. It is hoped that the usefulness of this book will justify the labor which has been spent in its preparation.

The writer, in presenting to the profession a volume thoroughly American, begs to acknowledge his indebtedness to the essay of Mr. William Wills, the last edition of which was prepared by his son, Judge Alfred Wills. It has been thought wisest to follow Mr. Wills' plan in its main divisions, and to preserve much of what is valuable in his scientific discussion concerning the phenomena on which the rules of circumstantial evidence are based.

ARTHUR P. WILL.

CHICAGO, November 2nd, 1896.

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PART I.

PRELIMINARY CONSIDERATIONS.

DIVISION I.

EVIDENCE IN GENERAL.

CHAPTER I.

THE NATURE OF EVIDENCE.

THE great object of all intellectual research is the discovery of TRUTH, which is either OBJECTIVE AND ABSOLUTE, in which sense it is synonymous with being or existence, or SUBJECTIVE AND RELATIVE, in which acceptation it expresses the conformity of our ideas and mental convictions with the nature and reality of events and things.

The JUDGMENT is that faculty of the mind which is principally concerned in the investigation and acquisition of truth; and its exercise is the intellectual act by which one thing is perceived and affirmed of another, or the reverse.

Every conclusion of the judgment, whatever may be its subject, is the result of EVIDENCE—a word which (derived from words in the dead languages signifying to see, to know) by a natural transition is applied to denote the *means* by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved.¹ Testimony is not synonymous with evidence:² the latter is the more compre-

¹ 1 Greenl. on Ev. c. i. § 1. That which is legally offered by the litigant parties to induce a jury to decide for or against the party alleging such facts as, contradistinguished from all comment and argument on the subject, fall within the description of evidence. Stark. on Ev. (10th Am. Ed.) 12.

² Harvey v. Smith, 17 Ind. 272.

hensive term.¹ The term testimony, properly applied, signifies the statement made by a witness under oath or affirmation ;² while evidence includes all that may be submitted to the jury, whether it be the statement of witnesses or the contents of papers, documents, or records, or the inspection of whatever the jury may be permitted to examine and consider during the trial.³ By the California Code of Civil Procedure judicial evidence is defined as the means sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact.⁴ And the law of evidence is declared to be a collection of general rules established by law,—

1. For declaring what is to be taken as true without proof ;
2. For declaring the presumptions of law, both those which are disputable and those which are conclusive ; and,
3. For the production of legal evidence ;
4. For the exclusion of whatever is not legal ;
5. For determining in certain cases the value and effect of evidence.⁵

The rules of evidence are the maxims which the sagacity and experience of ages have established as the best means of discriminating truth from error, and of contracting as far as possible the dangerous power of judicial discretion. They have their origin in man's nature, as an intellectual and a moral being ; and "are founded" (to use the language of one of the most eloquent of advocates) "in the charities of religion, in the philosophy of nature, in the truths of

¹ Whart. Cr. Law, § 783.

² Bouvier's Law Dict. (15th Ed.) vol. ii. p. 723, tit. "Testimony."

³ Jones v. Gregory, 48 Ill. App. 230.

⁴ § 1823.

⁵ § 1825. The means which the law employs for investigating the truth of a past transaction are those which are resorted to by mankind for similar, but extrajudicial purposes. With these general principles the law can interfere in two ways only ; either by excluding and restraining mere natural evidence by the application of artificial tests of truth, or annexing an artificial effect to evidence beyond that which it would otherwise possess. Hence it is that the great principles of evidence may be reduced to three classes, comprising : 1. The principles of evidence which depend on ordinary experience and natural reason, independently of any artificial rules of law ; 2. The artificial principles of law which operate to the partial exclusion of natural evidence by prescribing tests of admissibility, and which may properly be called the excluding principles of law ; 3. The principles of law which either create artificial modes of evidence or annex an artificial effect to mere natural evidence. Stark. Ev. (10th Am. Ed.) 15.

history, and in the experience of common life.”¹ “Rules of evidence,” said Daniel Webster, “are rules of law, and their observance can no more be dispensed with than any other rules of law. Whatever may be imagined to the contrary, it will commonly be found that a disregard of the ordinary rules of evidence is but the harbinger of injustice.”²

The term *PROOF* is often confounded with that of evidence, and applied to denote the *medium* of proof, whereas in strictness it marks merely the *effect* of evidence.³ When the result of evidence is undoubting assent to the certainty of the event or proposition which is the subject-matter of inquiry, such event or proposition is said to be *proved*; and, according to the nature of the evidence on which such conclusion is grounded, it is either *known* or *believed* to be true. Our judgments, then, are the consequence of proof; and proof is that quantity of appropriate evidence which produces assurance and certainty. Evidence, therefore, differs from proof, as cause from effect.⁴

¹ 29 St. Tr. 166.

² In this connection some remarks of the learned editor of the late edition of Wilson's Works are valuable. In the note to the chapter on *THE NATURE AND PHILOSOPHY OF EVIDENCE*, p. 458, he says :—“The law of evidence is much more than merely a part of the law of procedure. Many of its rules are substantive law and fall within the provisions of the constitution. *Kring v. Mo.*, 107 U. S. 221. The rule is that no one shall be condemned or dis-seized unheard, and by a hearing is meant that an opportunity shall be given to produce all of his evidence and to have it weighed according to fixed principles of law. This benign principle pervades every department of government and every walk of life; every right which the law recognizes as within its protection is entitled to the same immunity.”

³ Whately, *Logic*, c. iii.; *Schloss v. Creditors*, 31 Cal. 203; *Perry v. Dubuque S. W. R. Co.*, 36 Ia. 106.

⁴ Mr. Justice Wilson has designated fourteen distinct sources of evidence : 1. The external senses. 2. Consciousness. 3. Taste. 4. The moral sense. 5. Natural signs. 6. Artificial signs. 7. Human testimony in matters of fact. 8. Human authority in matters of opinion. 9. Memory. 10. Experience. 11. Analogy. 12. Judgment. 13. Reasoning. 14. Calculations concerning chances. *Wilson's Works*, pp. 467, 468.

CHAPTER II.

THE VARIOUS KINDS OF EVIDENCE.

TRUTH is either abstract and necessary, or probable and contingent; and each of these kinds of truth is discoverable by appropriate but necessarily different kinds of evidence. This classification, however, is not founded in any essential difference in the nature of truths themselves, and has reference merely to our imperfect capacity and ability of perceiving them; since to an Infinite Intelligence nothing which is the object of knowledge can be probable, and everything must be perceived absolutely and really as it is.¹

In many instances the correspondence of our ideas with realities is perceived instantaneously, and without any conscious intermediate process of reasoning, in which cases the judgment is said to be *INTUITIVE*, from a word signifying to look at; and the evidence on which it is founded is also denominated intuitive; though it would perhaps be more correct to use that word as descriptive of the nature of the mental operation, rather than of the kind of evidence on which it rests.

INTUITION is the foundation of *DEMONSTRATION*, which consists of a series of steps severally resolvable into some intuitive truth. Demonstration concerns only necessary and immutable truth; and its first principles are definitions, which exclude all ambiguities of language, and lead to infallibly certain conclusions.²

But the subjects which admit of the certainty of intuition and demonstration are comparatively few. Innumerable truths, the knowledge of which is indispensable to happiness, if not to existence, depend upon evidence of a totally different kind, and admit of no other guide than our own observation and experience, or the testimony of our fellow-men. Such truths involve questions of fact or of actual existence, which, as they are not of a necessary nature, may or may not have existed, without

¹ Butler's Analogy, Introduction.

² Stewart's Elements of the Philosophy of the Human mind, c. ii. § 3.

involving any contradiction, and as to which our reasonings and deductions may be erroneous. Such evidence is called **MORAL EVIDENCE**; probably because its principal application is to subjects directly or remotely connected with moral conduct and relations.¹

Of the various kinds of moral evidence, that of **TESTIMONY** is the most comprehensive and important in its relation to human concerns; so extensive is its application, that to enter on the subject of testimony at large would be to treat of the conduct of the understanding in relation to the greater portion of human affairs.

THE DESIGN OF THIS WORK is limited to the consideration of some of the principal rules and doctrines peculiar to circumstantial evidence as applicable to criminal jurisprudence, one of the leading heads under which philosophical and juridical writers consider the subject of testimonial evidence. Nor is it proposed to treat, except cursorily and incidentally, of *documentary* circumstantial evidence; a subject which, however interesting in itself, is applicable principally to discussions upon the genuineness of historical and other writings; and such cases of this description as occasionally happen in the concerns of common life are referable to general principles, which equally apply to circumstantial evidence of every kind.

Considering how many of our most momentous determinations are grounded upon circumstantial evidence, and how important it is that they should be correctly formed, the subject is one of deep interest and moment. It would be most erroneous to conclude that, because it is illustrated principally by forensic occurrences, it especially concerns the business of the members of a particular profession. Such *events* are amongst the most interesting occurrences of social life; the *subject* relates to an intellectual process, called into exercise in almost every branch of human speculation and research.

1 "Truths alone" (say the civilians) "which depend on abstract principles are susceptible of demonstrative evidence; truths that depend on matters of fact, however complete may be the evidence by which they are established, can never become demonstrative. . . . In demonstrative evidence there are no degrees: one demonstration may be more easily comprehended; but it cannot be stronger than other. Every necessary truth leaves no possibility of its being false. In moral evidence we rise by an insensible gradation, from possibility to probability, and from probability to the highest degree of moral certainty." Wilson's Works, pp. 498, 499.

CHAPTER III.

NATURE OF THE ASSURANCE PRODUCED BY DIFFERENT KINDS OF EVIDENCE.

IN investigations of every kind it is essential that the correct estimate be made of the kind and degree of assurance of which the subject admits.

Since the evidence of DEMONSTRATION relates to necessary truths (as to which the supposition of the contrary involves not merely what is not and cannot be true, but what is also absurd), and since MORAL EVIDENCE is the basis of contingent or probable truth merely, it follows that the convictions which these various kinds of evidence are calculated to produce must be of very different natures. In the former case ABSOLUTE CERTITUDE is the result; to which MORAL CERTAINTY, the highest degree of assurance of which truths of the latter class admit, is necessarily inferior.

Unlike the assent, which is the inevitable result of mathematical reasoning, BELIEF in the truth of events may be of various degrees, from moral certainty, the highest, to that of mere probability, the lowest; between which extremes there are innumerable degrees and shades of conviction, which the latency of mental operations and the unavoidable imperfections of language render it impossible to define or express. In subjects of moral science the want of appropriate words, and the occasional application of the same word to denote different things, have given occasion to much obscurity and confusion, both of idea and expression; of which a remarkable exemplification is presented in the words probability and certainty.

The general meaning of the word PROBABILITY is likeness or similarity to some other truth, event, or thing.¹ Sometimes the word probability is used to express the preponderance of the

¹ Butler's Analogy, *ut supra*; Locke's Essay Concerning Human Understanding, b. iv. c. xv.; Cic. De Inventione, c. 47.

evidence or arguments in favor of the existence of a particular event or proposition, or adverse to it; and sometimes as assertive of the abstract and intrinsic credibility of a fact or event.

In its former sense the word probability is applied as well to certain mathematical subjects as to questions dependent upon moral evidence, and expresses the ratio of the favorable cases to all the possible cases by which an event may happen or fail; and it is represented by a fraction, the numerator of which is the sum of the favorable cases, and the denominator the whole number of possible cases, certainty being represented by unity. If the number of chances for the happening of the event be $=0$, and the event be consequently impossible, the expression for that chance will be $=0$; and so, if the number of chances of the failure of the event be $=0$, and the event be therefore certain, the expression for the chance of failure will also be $=0$. If $m+n$ be the whole number of cases, m the favorable, and n the unfavorable ones, the probability of the event is $m : m+n$. It follows that if there be an equality of chances for the happening or the failing of an event, the fraction expressive of the probability is $=\frac{1}{2}$, the mean between certainty and impossibility; ¹ and probability, therefore, includes the whole range between those extremes.

The terms CERTAINTY and PROBABILITY are, however, essentially different in meaning as applied to moral evidence, from what they import in a mathematical sense; inasmuch as the elements of moral certainty and moral probability, notwithstanding the ingenious arguments which have been urged to the contrary, appear to be incapable of numerical expression, and because it is not possible to assign all the chances for or against the occurrence of any particular event.

The expression MORAL PROBABILITY, though liable to objection on account of its deficiency in precision, is, for want of one more definite and appropriate, of frequent and necessary use; nor will its application lead to mistake, if it be remembered that it denotes only the preponderance of probability, resulting from the comparison and estimate of *moral* evidence, and that if this were capable of being expressed with exactness, it would lose its essential characteristic and possess the certainty of demonstration.

¹ Kirwan's Logic, part iii. c. vii. § 1.

The preceding strictures equally apply to the term **MORAL CERTAINTY**, or its equivalent, **MORAL CONVICTION**, which must be understood, not as importing deficiency in the proof, but only as descriptive of the kind of certainty which is attainable by means of moral evidence; and it is that full and complete assurance which admits of no degrees, and induces a sound mind to act without doubt upon the conclusions to which it naturally and reasonably leads.¹

It has been justly and powerfully remarked that "the degree of excellence and of strength to which testimony may rise seems almost indefinite. There is hardly any cogency which it is not capable, by possible supposition, of attaining. The endless multiplication of witnesses, the unbounded variety of their habits of thinking, their prejudices, their interests, afford the means of conceiving the force of their testimony augmented *ad infinitum*, because these circumstances afford the means of diminishing indefinitely the chances of their being all mistaken, all misled, or all combining to deceive us."² But if evidence leave reasonable ground for doubt, the conclusion cannot be morally certain, however great may be the preponderance of probability in its favor.

Some mathematical writers have propounded numerical fractions for expressing moral certainty; which, as might have been expected, have been of very different values. But the nature of the subject precludes the possibility of reducing to the form of arithmetical notation the subtle, shifting, and evanescent elements of moral assurance, or of bringing to quantitative comparison things so inherently different as certainty and probability. The attempt to reduce circumstantial evidence into arithmetical proportions is merely fanciful, and no rules of that kind have been settled by any adjudged case.³

Other writers have given, in a more general manner, mathematical form to moral reasonings and judgments; but it is questionable if they have done so with any useful result, however they may have shown their own ingenuity.⁴ Though it is true that some very important deductions from the doctrine of

¹ 2 Stewart's Elements, c. ii. § 4; Encyclopædia Brit., art. *Metaphysics*, part i.

² Lord Brougham's Disc. on Natural Theology, 251.

³ State v. Roe, 12 Vt. 93; Wilson's Works, 226. See *infra*, p. 14, n. 2.

⁴ Kirwan's Logic, part iii. c. vii. § 21; Whately's Logic, b. iv. c. ii. § 1.

chances are applicable to events dependent upon the duration of human life, such as the expectation and the decrement of life, the law of mortality, the value of annuities, and other contingencies, and also to reasoning in the abstract upon particular cases of testimonial evidence, yet it is obvious that all such conclusions depend upon circumstances, which, notwithstanding that to the unreflecting observer they appear casual, uncertain, and irreducible to principle, unlike moral facts and reasonings in general, are really based upon and deducible from numerical elements.

A learned writer, whose writings, in despite of his eccentricities of matter and of style, have exercised great influence in awakening the spirit of judicial reformation, asks,¹ "Does justice require less precision than chemistry?" The truth is that the precision attainable in the one case is of a nature of which the other does not admit. It would be absurd to require the proof of an historic event by the same kind of evidence and reasoning as that which establishes the equality of triangles upon equal bases, and between the same parallels, or that the *latus rectum* in an ellipse is a third proportional to the major and minor axes.

This conscript father of legal reforms² has himself supplied a memorable illustration of the futility of his own inquiry. He has proposed a scale for measuring the degrees of belief, with a positive and negative side, each divided into ten degrees, respectively affirming and denying the same fact, zero denoting the absence of belief; and the witness is to be asked what degree expresses his belief most correctly. With characteristic ardor, the venerable author gravely argues that this instrument could be employed without confusion, difficulty, or inconvenience.³ But MAN must become wiser and better before the mass of his species can be entrusted with the use of such a moral gauge, from which the unassuming and the wise would shrink, while it would be eagerly grasped by the conceited, the interested, and the bold.

¹ Bentham's *Traité des Preuves Judiciaires*, b. i. c. xvii. ; Mackintosh's *Discourse on the Progress of Ethical Philosophy*, 290.

² Hoffman's *Course of Legal Study*, 364.

³ Bentham's *Rationale of Judicial Ev.* b. i. c. vi. § 1, and see in Kirwan's *Logic*, part iii. c. vii. § 21, a proposed scale of testimonial probability.

But though a process strictly mathematical cannot be applied to estimate the effect of moral evidence, a proceeding somewhat analogous is observed in the examination of a group of facts adduced as grounds for inferring the existence of some other fact. Although an *exact* value cannot be assigned to the testimonial evidence for or against a matter of disputed fact, the separate testimony of each of the witnesses has nevertheless a determinate *relative* value, depending upon considerations which it would be foreign to the present subject to enumerate. On one side of the equation are mentally collected all the facts and circumstances which have an affirmative value; and on the other, all those which either lead to an opposite inference, or tend to diminish the weight, or to show the non-relevancy, of all or any of the circumstances which have been put into the opposite scale. The value of each separate portion of the evidence is separately estimated, and, as in algebraic addition, the opposite quantities, positive and negative, are united, and the *balance* of probabilities is what remains as the ground of human belief and judgment.

But, as has been already intimated, there is another sense in which the word probability is often used, and in which it denotes CREDIBILITY OR INTERNAL PROBABILITY, and expresses our judgment of the accordance or similarity of events with which we become acquainted, through the medium of testimony, with facts previously known by experience.¹

The results of EXPERIENCE are, expressly or impliedly, assumed as the standard of credibility in all questions dependent upon moral evidence. By means of the senses and of our own consciousness we become acquainted with external nature, and with the characteristics and properties of physical things and moral beings, which are then made the subjects of memory, reflection, and other intellectual operations; and thus ultimately the mind is led to the recognition of the principle of causality and other necessary truths, which become the basis and standard of comparison in similar and analogous circumstances. The groundwork of our reasoning is an instinctive and inevitable belief in the truthfulness and legitimacy of our own faculties and in the permanence of the order of external nature, as also in the existence of moral causes, which operate with an unvarying uniformity, not inferior to, and, perhaps,

¹ Abercrombie on the Intellectual Powers, part ii. § 8.

surpassing even, the stability of physical laws ; though, relatively to our feeble and limited powers of observation and comprehension, and on account of the latency, subtlety, and fugitiveness of mental operations, and of the infinite diversities of individual men, there is apparently more of uncertainty and confusion in moral than in material phenomena.¹

Experience comprehends not merely the facts and deductions of personal observation, but the observations of mankind at large of every age and country. It would be absurd to disbelieve and reject as incredible the relations of events because such events have not occurred within the range of individual experience. We may remember the unreasonable incredulity of the King of Siam, who, when the Dutch ambassador told him that in his country the water in cold weather became so hard that men walked upon it, and that it would even bear an elephant, replied, "Hitherto I have believed the strange things you have told me, because I look upon you as a sober, fair man, but now I am sure you lie."²

By experience, facts or events of the same character are referred to causes of the same kind ; by ANALOGY, facts and events similar in some but not in all of their particulars to other facts and occurrences, are concluded to have been produced by a similar cause : so that analogy vastly exceeds in its range the limits of experience in its widest latitude, though their boundaries may sometimes be coincident, and sometimes undistinguishable. It has been profoundly remarked that "in whatever manner the province of experience, strictly so called, comes to be thus enlarged, it is perfectly manifest that, without some such provision for this purpose, the principles of our constitution would not have been duly adjusted to the scene in which we have to act. Were we not so formed as eagerly to seize the resembling features of different things and different events, and to extend our conclusions from the individual to the species, life would elapse before we had acquired the first rudiments of that knowledge which is essential to our animal existence."³ Every branch of knowledge presents in-

¹ Hampden's Lectures on Moral Philosophy, 150 ; Abercrombie's Philosophy of the Moral Feelings, Prelim. Obs., § ii.

² Locke on the Human Understanding, b. iv. c. xv. § 5. See also Stark. on Ev. (10th Am. Ed.) 883.

³ Stewart's Elements, *ut supra*, c. ii. § iv.

structive examples of the extent to which this mode of reasoning may be securely carried. Newton, from having observed that the refractive forces of different bodies follow the ratio of their densities, was led to predict the combustibility of the diamond ages before the mechanical aids of science were capable of verifying his prediction; nor is the sagacity of the conjecture the less striking, because this correspondence has been discovered not to be without exception. The scientific observer, from the inspection of shapeless fragments, which have moldered under the suns and storms of ages, constructs a model of the original in its primitive magnificence and symmetry. A profound knowledge of comparative anatomy enabled the immortal Cuvier, from a single fossil bone, to describe the structure and habits of many of the extinct animals of the antediluvian world. In like manner an enlightened knowledge of human nature often enables us, on the foundation of apparently slight circumstances, to follow the tortuous windings of crime, and ultimately to discover its guilty author, as infallibly as the hunter is conducted by the track to his game.

The following pertinent and instructive observations may advantageously close this part of our subject, comprehending, as they do, everything which can be usefully adduced in illustration of the necessity and value of the principle of analogy: "In all reasonings concerning human life we are obliged to depend on analogy, if it were only from that uncertainty, and almost suspension of judgment, with which we must hold our conclusions. We can seldom obtain that number of instances which is requisite here to establish an inference indisputably. The conduct of persons or of parties may have been attended by certain antecedents and certain results in the examples before us; still the state of the case may be owing not so much to that conduct, as to other causes, which are shut out of our view, when our attention is fixed on the particular examples adduced for the purpose of the inference. We must thus be strictly on our guard against transferring to other cases anything merely contingent and peculiar to the instances on which our reasoning is founded. And this is what analogical reasoning requires and enables us to do. If rightly pursued it is employed at once both in generalizing and discriminating; in the acute perception at once of points of agreement and points of

difference. The acme of the philosophical power is displayed in the perfect co-operation of these two opposite proceedings. We must study to combine in such a way as not to merge real differences; and so to distinguish as not to divert the eye from the real correspondence.”¹

It may be objected, that the minds of men are so differently constituted, and so much influenced by differences of experience and culture, that the same evidence may produce in different individuals very different degrees of belief; that one man may unhesitatingly believe an alleged fact, upon evidence which will not in any degree sway the mind of another. It must be admitted that moral certainty is not the same fixed and unvarying standard, alike in every individual; that scepticism and credulity are modifications of the same principle, and that to a certain extent this objection is grounded in fact; but nevertheless, the psychological considerations which it involves have but little alliance with the present subject; the argument, if pushed to its extreme, would go to introduce universal doubt and distrust, and to destroy all confidence in human judgment founded upon moral evidence. It is as impossible to reduce men's minds to the same standard, as it is to bring their bodies to the same dimensions; but in the one case, as well as in the other, there is a general agreement and similarity, any wide departure from which is instantly perceived to be eccentric and extravagant. The question is, not what may be the *possible* effect of evidence upon minds *peculiarly* constructed, but what ought to be its fair result with men, such as the generality of civilized men are.

It is of no moment in relation to criminal jurisprudence, that exact expression cannot be given to the inferior degrees of belief. The doctrine of chances, and nice calculations of probabilities, cannot, except in a few cases, and then only in a very general and abstract way, be applied to human actions, which are essentially unlike, and dependent upon peculiarities of persons and circumstances which render it impossible to assign to them a precise value, or to compare them with a common numeral standard; nor are they capable in any degree, or under any circumstances, of being applied to actions which infer legal responsibility. In the common affairs of life men are frequently obliged, from necessity and duty, to act upon

¹ Hampden's Lectures, *ut supra*, 178.

the lowest degree of belief ; and, as Mr. Locke justly observes, " He that will not stir till he infallibly knows the business he goes about will succeed, will have little else to do but to sit still and perish." ¹ But in such cases our judgments commonly concern ourselves, and our own motives, duties, and interests ; while in the administration of penal justice the magistrate is called upon to apply to the conduct of *others* a rule of action applicable to a given state of facts, where external and sometimes ambiguous indicia alone constitute the grounds of judgment. In the application of every such rule, the certainty of the facts is presupposed, and is its only foundation and vindication ; and upon any lower degree of assurance, its application would be arbitrary and indefensible. ²

¹ Essay on the Human Understanding, bk. iv. c. xiv. § 1.

² " Concerning circumstantial proofs," says Mr. Justice Wilson, " rules, unsatisfactory, because unfounded, have been heaped upon rules, volumes have been heaped upon volumes, and evidence has been added, and divided, and subtracted, and multiplied, like pounds, and shillings, and pence, and farthings. In the parliament of Toulouse, we are told by Voltaire, they admitted of quarters and eighths of a proof. For instance, one hearsay was considered as a quarter ; another hearsay more vague, as an eighth ; so that eight vague hearsays, which, in fact, are no more than the reverberated echoes of a report, perhaps originally groundless, constitute a full proof. Upon this principle it was that poor Calas was condemned to the wheel.

" Evidence is that which produces belief. Belief is a simple act of the mind more easily experienced than described. Its degrees of strength or weakness cannot, like those of heat and cold, be ascertained by the precise scale of an artificial thermometer. Their effects, however, are naturally felt and distinguished by a sound and healthful mind. With great propriety, therefore, the common law forbears to attempt a scale or system of rules concerning the force or credibility of evidence : it wisely leaves them to the unbiased and unadulterated sentiments and impressions of the jury." Wilson's Works, vol. ii. 225, 226.

DIVISION II.

CIRCUMSTANTIAL EVIDENCE.

CHAPTER I.

THE CHARACTERISTICS OF CIRCUMSTANTIAL EVIDENCE.

ON a superficial view, direct and indirect, or circumstantial, would appear to be *distinct* species of evidence ; whereas these words denote only the different modes in which those classes of evidentiary facts operate to produce conviction. Circumstantial evidence is of a nature identically the same with direct evidence ; the distinction is, that by DIRECT EVIDENCE is intended evidence which applies directly to the fact which forms the subject of inquiry, the *factum probandum* ; CIRCUMSTANTIAL EVIDENCE is equally direct in its nature, but, as its name imports, it is direct evidence of a minor fact or facts, incidental to or usually connected with some other fact as its accident, and from which such other fact is therefore inferred.

By the Georgia code circumstantial evidence is defined as that which only tends to establish the issue by proof of various facts sustaining, by their consistency, the hypothesis claimed.¹ A witness deposes that he saw A. inflict on B. a wound, of which he instantly died ; this is a case of direct evidence. B. dies of poison ; A. is proved to have had malice and uttered threats against him, and to have clandestinely purchased poison, wrapped in a particular paper, and of the same kind as that which has caused death ; the paper is found in his secret drawer, and the poison gone. The *evidence* of these facts is *direct* ; the facts themselves are *indirect* and *circumstantial*, as applicable to the inquiry whether a murder has been committed, and

¹ Ga. Code, § 3748.

whether it was committed by A.¹ Circumstantial evidence consists in reasoning from facts which are proved to establish such as are conjectured to exist.²

So rapid are our intellectual processes that it is frequently difficult, and even impossible, to trace the connection between an act of the judgment and the train of reasoning of which it is the result; and the one appears to succeed the other instantaneously, by a kind of necessity. This fact obtains most commonly in respect of matters which have been frequently the objects of mental association.

In matters of direct testimony, if credence be given to the relators, the act of hearing and the act of belief, though really not so, seem to be contemporaneous. But the case is very different when we have to determine upon circumstantial evidence, the judgment in respect of which is essentially *inferential*. There is no apparent necessary connection between the facts and the inference; the *facts* may be true, and the *inference* erroneous, and it is only by comparison with the results of observation in similar or analogous circumstances, that we acquire confidence in the accuracy of our conclusions.

The term PRESUMPTIVE is frequently used as synonymous with CIRCUMSTANTIAL EVIDENCE; but it is not so used with strict accuracy. The word "presumption," *ex vi termini*, imports an *inference* from facts. A presumption in strictness is an inference as to the existence of one fact, from a knowledge of the existence of some other fact, made solely by virtue of previous experience of the ordinary connection between the known

¹ "It is obvious that the means of indirect proof must usually be supplied by direct proof; for no inference can be drawn from any collateral facts until those facts have themselves been first satisfactorily established, either by actual observation, or information derived from others who have derived their knowledge from such observation." Stark. Ev. (10th Am. Ed.) 17. Mr. Bishop in his Criminal Procedure (2d Ed.), p. 1069, defines circumstantial evidence as a "species of presumptive evidence consisting in this, that where there is no satisfactory evidence of the direct fact, certain facts which are assumed to have stood around, or been attendant on, the main fact are proved, from the existence of which the direct fact may be inferred." In *Jenkins v. State*, 62 Wis. 49, a charge given in the language of this passage was criticised, the objection being mainly to the use of the word "assumed." It was contended that this authorized the jury to assume the existence of facts which were not proved. The court, however, held that no such construction could be put on the language, the word "assumed" being evidently used in the sense of *claimed*.

² *People v. Kennedy*, 82 N. Y. 141.

and inferred facts, and independently of any process of reason in the particular instance.¹ And the adjunct "presumptive," as applied to evidentiary facts, *implies* the certainty of some *relation* between the facts and the inference.

Circumstances generally, but not necessarily, lead to particular inferences; for the facts may be indisputable, and yet their relation to the principal fact may be only apparent, and not real; and even when the connection is real, the deduction may be erroneous. Circumstantial and presumptive evidence differ, therefore, as genus and species.

The force and effect of circumstantial evidence depend upon its incompatibility with, and incapability of, explanation or solution upon any other supposition than that of the truth of the fact which it is adduced to prove; the mode of argument resembling the method of demonstration by the *reductio ad absurdum*. But this is a part of the subject which will more appropriately admit of amplification in a subsequent part of this volume.

¹ Stark. Ev. (10th Am. Ed.) 889.

CHAPTER II.

PRESUMPTIONS.

It is essential to a just view of our subject that our notions of the nature of PRESUMPTIONS should be precise and distinct. A PRESUMPTION is a probable consequence, drawn from facts (either certain or proved by direct testimony), as to the truth of a fact alleged, but of which there is no direct proof. It follows, therefore, that a presumption of any fact is an inference of that fact from others that are known.¹ The word "presumption," therefore, inherently imports an act of reasoning, a conclusion of the judgment; and it is applied to denote such facts or moral phenomena as from experience we know to be invariably or commonly connected with some other related fact. A wounded and bleeding body is discovered; it has been plundered; wide and deep footmarks are found in a direction proceeding from the body; or a person is seen running from the spot. In the one case are observed marks of flight, in the other is seen the fugitive, and we know that guilt naturally endeavors to escape detection. These circumstances induce the presumption that crime has been committed; the presumption is a conclusion or consequence from the circumstances. The antecedent circumstances, therefore, are one thing, the presumption from them another and different one. Of presumptions afforded by moral phenomena, a memorable instance is recorded in the Judgment of Solomon, whose knowledge of the all-powerful force of maternal love supplied him with an infallible criterion of truth.² So, when Aristippus, who had been cast away on an unknown shore, saw certain geometrical figures traced in the sand, his inference that the country was inhabited by a people conversant with mathe-

¹ Per ABBOTT, C. J., in *Rex v. Burdett*, 4 B. & Ald. 161. See also *Roberts v. People*, 9 Col. 458.

² Domat's Civ. Law, b. iii. tit. 6.

matics was a presumption of the same nature.¹ It is evident that this kind of reasoning is not peculiar to legal science, but is a logical process common to every subject of human investigation.

All presumptions connected with human conduct are inferences founded upon the observation of man's nature as a sentient being and a moral agent; and they are necessarily infinite in variety and number, differing according to the diversities of individual character, and to the innumerable and ever-changing situations and emergencies in which men are placed. Hence the importance of a knowledge of the instincts, affections, desires, and moral capabilities of our nature, to the correct deduction of such presumptions as are founded upon them, and which are therefore called NATURAL PRESUMPTIONS.²

LEGAL PRESUMPTIONS are founded upon natural presumptions, being such natural presumptions as are connected with human actions, so far as they are authoritatively constituted by the legislator or deduced by the magistrate.³

The civilians divided legal presumptions into two classes, namely, *præsumptiones juris et de jure*, and *præsumptiones juris* simply.

Presumptions of the former class were such as were considered to be founded upon the connection and relation so intimate and certain between the fact known and the fact sought, that the latter was deemed to be an infallible consequence from the existence of the first. Such presumptions were called *præsumptiones juris*, because their force and authority were recognized by the law; and *de jure*, because they were made the foundation of certain specific legal consequences,⁴ against which no argument or evidence was admissible; while *præsumptiones juris* simply, though deduced from facts characteristic of truth, were always subject to be overthrown by proof of facts leading to a contrary presumption. And our own writers, having regard to this classification, have considered presumptions of law under two heads, *conclusive* and *disputable*, or rebuttable.⁵

In matters of property, the principal modifications of

¹ Gambier's Introduction to the Study of Moral Ev. 55.

² Mascardus De Probationibus, Conclusio MCCXXVI.

³ Such, for instance, as that a child under seven years of age is incapable of committing a felony.

⁴ Menochius De Præsumptionibus, lib. i. q. 8.

⁵ 1 Greenl. on Ev. (14th Ed.) § 14 *et seq.*

which are matters of positive institution, the laws of every country have created artificial legal presumptions, grounded upon reasons of policy and convenience, to prevent social discord, and to fortify private right. The justice and policy of such regulations have been thus eloquently enforced: "Civil cases regarded property; now, although property itself is not, yet almost everything concerning property, and all its modifications, is, of artificial contrivance. The rules concerning it become more positive, as connected with positive institutions. The legislator, therefore, always, the jurist frequently, may ordain certain methods, by which alone they will suffer such matters to be known and established; because their very essence, for the greater part, depends on the arbitrary conventions of men. Men act on them with all the power of a creator over his creatures. They make fictions of law and presumptions of law (*præsumptiones juris et de jure*) according to their ideas of utility, and against those fictions, and against presumptions so created, they do and may reject all evidence."¹

But in penal jurisprudence, man as a physical being and a moral agent, such as he is by natural constitution, and by the influences of social condition, is the subject of inquiry. Punitive justice is applied to injurious actions proceeding from malignity of purpose, and not to physical actions merely. It has been said with great force and accuracy that "where the subject is of a physical nature, or of a moral nature, independent of their conventions, men have no other reasonable authority than to register and digest the results of experience and observation;" and that "the presumptions which belong to criminal cases are those natural and popular presumptions which are only observations turned into maxims, like adages and apophthegms, and are admitted (when their grounds are established) in the place of proof, where better is wanting, but are to be always overturned by counter-proof."² Hence, therefore, a third class of presumptions, which the civilians called *præsumptions hominis*, because they were inferred by the sagacity and discretion of the judge from the facts judicially before him. Such presumptions are in fact natural presumptions simply,

¹ 2 Burke's Works, 623; ed. 1834, by Holdsworth and Ball; 3 Mascardus, *ut supra*, Conclusio MCCXXVIII.

² Burke's Works, *ut supra*, 623; 3 Mascardus, *ut supra*, Conclusio MCCXXVIII.

deriving their force from that relation and connection which are recognized and acknowledged by the unsophisticated reason of all observing and reflecting men.

Presumptions of every kind, to be just, must be dictated by nature and reason; and, except under special and peculiar circumstances, it is impossible, without a dereliction of every rational principle, to lay down positive rules of presumption, where every case must of necessity be connected with peculiarities of personal disposition and of concomitant circumstances, and be therefore irreducible to any fixed principle. In criminal jurisprudence, therefore, arbitrary presumptions should be and indeed are, sparingly admitted; and even when they are so, they occasionally work injustice.¹ On the conviction of the captain of a schooner for having naval stores in his possession, Mr. Baron Alderson, in passing sentence of six months' imprisonment, said that he was satisfied he had become possessed of the stores in ignorance of the Act of Parliament, but that it was of the greatest importance that its provisions should be generally known, and expressed his hope that his good character would operate to obtain a mitigation of the sentence.² It would be as unreasonable to subject human actions to unbending rules of presumption, as to prescribe to the commander of a ship inflexible rules for his conduct without any latitude of discretion in the unforeseen and innumerable accidents and contingencies of the tempest and the ocean. Where a peremptory presumption of legal guilt is not pernicious and unjust, it is in general at least unnecessary; for, if it be a fair conclusion of the reason, it will be adopted by the tribunals, without the mandate of the legislature. There may, no doubt, be cases where the provisions of the law are peculiarly liable to be defeated or evaded by subtle contrivances and shifts most difficult of prevention. But, even in such cases, legal presumptions can only be justifiable where the proximate substituted fact of presumption is clearly of a guilty character and tendency *per se*, and would afford, even in the absence of legal enactment, a strong moral ground of presumption indicative of the particular act

¹ Artificial presumptions can never be safely established as a means of proof in a criminal case. To convict an innocent man is an act of positive injustice, which, according to one of the best and most humane principles of our law, cannot be expiated by the conviction of an hundred criminals who might otherwise have escaped. 2 Hale, 289.

² Reg. v. Trannock, Liverpool Winter Ass., 1848.

of criminality intended to be repressed ;¹ and however explicit and conclusive may be the language of the legislature, the tribunals must by an inherent necessity give effect to all such surrounding circumstances as tend to repel or modify the particular presumption, or to create a counter-presumption of equal or superior weight. It is impossible to recall without horror the sanguinary law² which made the concealment of the death of an illegitimate child by its mother conclusive evidence of murder, unless she could make proof, by one witness at least, that the child was born dead, and which too long disgraced our statute book ; whereas in truth it affords no ground to warrant such a conclusion, since it is more natural and more just to attribute the suppression to a desire to conceal female shame, and to escape open dishonor.

As evidentiary circumstances and their combinations are infinitely varied, so also are the presumptions to which they lead ; and a complete enumeration would in either case be impracticable. The writers on the civil law have made a comprehensive and instructive collection of facts and inferential conclusions, in relation to a vast number of actions connected with legal accountability. But many things advanced by those laborious and elaborate authors have relation to a state of society, and to legal institutions and modes of procedure, wholly dissimilar from our own. The law of England admits of no such thing as the *semi-plena probatio*, founded on circumstances of conjecture and suspicion only, which, in many countries governed by the Roman law, was held to warrant the infliction of torture with a view to compel admissions and complete imperfect proof. Hence the total inapplicability with us of the subdivisions of *indicia*, *signa*, *adminicula*, *conjecturæ*, *dubia*, and *suspiciones*, which are found in the writers of other countries whose jurisprudence is founded upon that of Rome, subdivisions which appear to be arbitrary, vague, and useless. But it is manifest that, under legal institutions which admitted of compulsory self-accusation, in order to complete proof insufficient and inconclusive in itself, and where the laws were administered by a single judge, without the salutary restraints of publicity and popular observation, an accurate and elaborate record of the multitudinous actions and occurrences which had been submitted

¹ *Traité des Preuves*, par Bonnier, 702 ; 3d Ed.

² Stat. 21 Jac. I. c. 27 ; repealed by 48 Geo. III. c. 58, § 3.

to the criminal tribunals operated as an important limitation upon the tyranny and inconstancy of judicial discretion.

It is calculated to excite surprise that arbitrary technical rules should ever have been adopted for estimating the force and effect of particular facts as leading to presumptions ; a matter purely one of reason and logic. It is probable, nevertheless, that the attempt originated in the desire to escape a still greater absurdity. "*Testis unus, testis nullus*," "*unus testis non est audiendus*," were fundamental maxims of the text-writers on the Civil and Canon Laws, and of most ancient codes,¹ as they still are of judicial procedure in many parts of Europe.² Since presumptions have not the same force as direct evidence, it was hence supposed to be required, as a logical sequence, that there should be a concurrence of three presumptions, as the imaginary equivalent for the testimony of two ocular witnesses, where such testimony was not to be had. It is discreditable to the state of moral and legal science that these absurd and antiquated notions, worthy of the darkest ages of society, should have been countenanced and perpetuated in the legislation of several of the nations of Europe even to the present day.³ It is obvious that a single presumption may be conclusive, and that an accumulation of many presumptions may be of but little weight. The simplest and most elementary dictates of common sense require that presumptions should not be numbered merely, but that they should be weighed according to the principles which are applied in estimating the effect of testimonial evidence.

The prevalence of these fallacious methods of judging of the force of evidence explains the foundation of the practice, abhorrent to every principle of judicial integrity, and which still extensively prevails, of condemning to a minor punishment persons who may be innocent, but against whom there may exist apparent grounds of strong presumption, though not that exact kind and amount of proof which the rules of evidence arbitrarily and unreasonably require ; as if a middle term in criminal jurisprudence were not an absurdity and self-contradiction.

¹ Deut. xvii. 6, 7, xix. 15 ; Numb. xxxv. 30 ; 4 Michaelis on the Laws of Moses by Smith, Art. cxcix.

² Code Hollandais, 1838 ; Code Pénal d'Autriche ; Code de Bavière, and many other German Codes.

³ Code Criminel de Prusse, 1805 ; Code de Procédure Criminelle d'Autriche, 1853 ; ditto de Modène, 1855.

dictory.¹ An eminent foreign jurist well remarks, that “Jamais il n’y a eu plus de condamnations injustes que sous l’empire d’une jurisprudence qui défendait de prononcer la peine capitale sur de simples indices.”²

The unreasonable stress which, in many countries whose criminal procedure is derived from the Civil Law, is laid upon the confession of the accused, and the unwarrantable means which are resorted to in order to obtain it, are the natural results of arbitrary and unphilosophical rules of evidence, which necessarily have the effect of closing many of the channels of truth; and frequently render it so difficult to obtain full legal proof of crime, that a late eminent jurist and criminal judge declared that unless a man chose to perpetrate his crimes in public, or to confess them, he need not fear a conviction.³

Attempts have been made by our own judicial writers, but with no useful results, to classify presumptions in a more general way under terms expressive of their effect, as VIOLENT OR NECESSARY, PROBABLE OR GRAVE AND SLIGHT.⁴ But this arrangement is specious and fanciful rather than practical and real; nor is it entirely accurate, since a presumption may be violent and yet not necessary.⁵ A more precise and intelligible classification of presumptions is into violent or strong, and slight.⁶

¹ See several such cases in *Narratives of Remarkable Criminal Trials*, translated from the German of Feuerbach, by Lady Duff Gordon. At Berne, in 1842, a man accused of murder by poisoning was sentenced to six years’ imprisonment, as *véhémentement suspect*.

² Bonnier, *ut supra*, 677.

³ Ed. Rev. lxxxii. 330; and see in Christison on Poisons, 61, ed. 2, a case where the crime of murder by poisoning was considered as not fully proved because the prisoner would not confess, but on account of the probability of his guilt he was condemned to fifteen years’ imprisonment.

⁴ Bentham’s *Rationale of Judicial Evidence*, b. i. c. vi.; Coke on Litt. 6 b.; 4 Blackstone’s Comm. 358.

⁵ Menochius, *ut supra*, lib. i. q. 3, Nos. 1, 2, 3; *Essai des Preuves*, par Gabriel, 373; Best on Presumptions, 40.

⁶ Judge WALWORTH, in *People v. Videto*, 1 Park. C. R. 603, divided presumptions into three classes, thus:—1. Violent, where the facts and circumstances are those which necessarily attend the fact presented; 2. Probable, where the facts and circumstances are those which usually attend the fact presented; 3. Light or rash, where the facts and circumstances might probably attend the fact. Lord Coke presents as an instance of a violent presumption, “where a man is found suddenly dead in a room, and another is found running out of that room with a bloody sword in his hand.” Starkie points out that this is in reality a case of circumstantial evidence, and not properly presumption in the strict sense of the word, saying, “It is

But it is impossible thus to classify more than a comparatively few of the infinite variety of circumstances connected with human actions and motives, or to lay down rules for distinguishing presumptions of one of these classes from those of another; and the terms of designation, from the inherent imperfections of language, although not wholly destitute of utility, are unavoidably defective in precision. We can therefore only usefully apply these epithets as relative terms; and the effect of particular facts must of necessity depend upon the reality and closeness of the connection between the principal and secondary facts, and upon a variety of considerations peculiar to each individual case, and can no more be predicated than the boundaries can be defined of the separate colors which form the solar bow.

It is convenient, and may be advantageous even, in order to obtain a comprehensive view of the tendencies and effect of a number of circumstances, to group them together in their chronological relation to the *factum probandum*, as ANTECEDENT, CONCOMITANT, and SUBSEQUENT; but to require the concurrence of these several kinds of presumption, as is the case in the criminal code of Bavaria, is an outrage upon all legal and philosophical principle.¹

By various statutes, many acts are made legal presumptions of guilt, and the onus of proving any matter of defense is expressly cast upon the party accused; but, with these exceptions, the truth of every accusation is determined by the voice of a jury, upon consideration of the intrinsic and independent merits of each particular case, acting upon those principles of reason and judgment by which mankind are governed in all other cases where the same intellectual process is called into exercise, unfettered by any obligatory and inflexible presumptions. The inexpediency and inefficacy of positive presumptions, as indications of the criminality of intention, in which alone consists the essence of legal guilt, have been thus exposed with equal force and elegance by the hand of a master: "The connection

evident that a witness who had never seen such a transaction before would as readily come to the proper conclusion, as one who had actually had experience of similar facts; and consequently that reason, and not any previous experience of similar association, supplies the inference." P. 753 (10th Am. Ed.).

¹ Bonnier, *ut supra*, 688; *Traité de la Preuve*, par Mittermaier (traduit par Alexandre), c. 61.

of the intention and the circumstances is plainly of such a nature as more to depend on the sagacity of the observer than on the excellency of any rule. The pains taken by the civilians on that subject have not been very fruitful; and the English law-writers have, perhaps as wisely, in a manner abandoned the pursuit. In truth, it seems a wild attempt to lay down any rule for the proof of intention by circumstantial evidence.”¹

¹ 2 Burke's Works, *ut supra*, 623.

In this chapter and in the preceding chapters of the volume, constant resort has been had to the reasoning of Mr. William Wills. (See Preface.) With one exception no other legal author with whose works the writer is familiar has understood so thoroughly the true nature of evidence. It has been thought that any attempt at an entirely new and original treatment of the matters thus far considered, must be, in comparison, weak and unsatisfactory.

The exception referred to above is Mr. Justice Wilson, whose lecture on “The Nature and Philosophy of Evidence” is a masterpiece, and well worthy the careful perusal of every lawyer or layman who has an ambition to be well informed “concerning the sound and genuine sources and principles of evidence.” Wilson's Works, vol. i, p. 457 *et seq.* The author cannot refrain from calling attention to the similarity of the methods of these two distinguished philosophers.

CHAPTER III.

RELATIVE VALUE OF DIRECT AND CIRCUMSTANTIAL EVIDENCE.

THE foregoing observations naturally lead to a comparison of the relative value of Direct and Indirect or Circumstantial Evidence; an inquiry which becomes the more necessary, on account of some novel and questionable doctrines which have received countenance even from the judgment seat.

The best writers, ancient and modern, on the subject of evidence, have concurred in treating circumstantial as inferior in cogency and effect to direct evidence; a conclusion which seems to follow necessarily from the very nature of the different kinds of evidence. But language of a directly contrary import has been so often used by authorities of no mean note, as to have become almost proverbial, and to require examination.

It has been said that "circumstances are inflexible proofs; that witnesses may be mistaken or corrupted, but things can be neither."¹ "Circumstances," says Paley, "cannot lie."² It is astonishing that sophisms like these should have passed current without animadversion. The "circumstances" are assumed to be in every case established beyond the possibility of mistake; and it is implied that a circumstance established to be true possesses some *mysterious force* peculiar to facts of a certain class. Now a circumstance is neither more nor less than a minor fact, and it may be admitted of all facts that they cannot lie; for a fact cannot at the same time exist and not exist: so that in truth the doctrine is merely the expression of a truism, that a fact is a fact. It may also be admitted that "circumstances are inflexible proofs," but assuredly of nothing more than of their own existence: so that this assertion is only a repetition of the same truism in different terms. Circum-

¹ Burnett's C. L. of Scotland, 523.

² Principles of Moral and Political Philosophy, b. vi. c. ix.

stantial proof, it has been said, loses nothing by the lapse of time, and may preponderate over the recollection of a credible witness.¹ And again, "Circumstantial evidence is often stronger and more satisfactory than direct, because it is not liable to delusion or fraud."²

A distinguished statesman and orator has advanced in unqualified terms the proposition, supported, he alleges, by the learned, that "when circumstantial proof is in its greatest perfection, that is, when it is most abundant in circumstances, it is much superior to positive proof."³ Paley has said, with more of caution, that "concurrence of well-authenticated circumstances composes a stronger ground of assurance than positive testimony, unconfirmed by circumstances, usually affords."⁴ Juries have been told that circumstantial evidence is as good as any other kind of evidence;⁵ that strong circumstances of suspicion may overcome positive evidence;⁶ and that circumstantial evidence is often more persuasive to convince the mind of a fact than the positive evidence of a witness.⁷

Mr. Baron Legge, upon a trial for murder, told the jury that where a "violent presumption *necessarily* arises from circumstances, they are more convincing and satisfactory than any other kind of evidence, *because facts cannot lie*."⁸ Mr. Justice Buller, in his charge to the jury in Donellan's case, said "that a presumption which *necessarily* arises from circumstances is very often more convincing and more satisfactory than any other kind of evidence, because it is not within the reach and compass of human abilities to invent a train of circumstances which shall be so connected together as to amount to a proof of guilt, without affording opportunities of contradicting a great part, if not all, of those circumstances."⁹

It is obvious that the doctrine laid down in these several passages is propounded in language which not only does not

¹ *Ridley v. Ridley*, 1 Cold. 323.

² *WHITMAN, C. J., State v. Thomas*, 6 Law Rep. 64.

³ 2 *Burke's Works*, 624, *ut supra*.

⁴ *Moral and Political Philosophy*, b. vi. c. ix.

⁵ *West v. State*, 76 Ala. 98.

⁶ *Nelson v. U. S.*, Pet. C. C. 235.

⁷ *U. S. v. Johns*, 1 Wash. C. C. 363. And see *The Robert Edwards*, 6 Wheat. 137; *The Struggle v. U. S.*, 9 Cranch, 71; *Kempner v. Churchill*, 8 Wall. 362.

⁸ *Rex v. Blandy*. 18 St. Tr. 1187.

⁹ *Gurney's Report of the trial of John Donellan, Esq., for murder, at the Assize at Warwick, March 30, 1781.*

accurately state the question, but implies a fallacy, and that extreme cases, the strongest ones of circumstantial and the weakest of positive evidence, have been selected for the illustration and support of a general position. "A presumption which necessarily arises from circumstances" cannot admit of dispute, and requires no corroboration; but then it cannot in fairness be contrasted with and opposed to positive testimony, unless of a nature equally cogent and infallible. If evidence be so strong as necessarily to produce certainty and conviction, it matters not by what *kind* of evidence the effect is produced; and the intensity of the proof must be precisely the same, whether the evidence be direct or circumstantial. It is not intended to deny that circumstantial evidence affords a safe and satisfactory ground of assurance and belief; that it may often be as conclusive upon the understanding as direct and positive evidence would be;¹ nor that in many individual instances it may be superior in proving power to other individual cases of proof by direct evidence. But a judgment based upon circumstantial evidence cannot, in any case, be more satisfactory than when the same result is produced by direct evidence, free from suspicion of bias or mistake.

Perhaps no single circumstance has been so often considered as certain and unequivocal in its effect as the *anno domini* water-mark usually contained in the fabric of writing paper; and in many instances it has led to the exposure of fraud in the propounding of forged as genuine instruments. But it is beyond any doubt that issues of paper have taken place bearing the water-mark of the year succeeding that of its distribution, a striking exemplification of the fallacy of some of the arguments which have been remarked upon.

The proper effect of circumstantial as compared with direct evidence was thus accurately stated by Lord Chief Baron Macdonald: "When circumstances connect themselves closely with each other, when they form a large and a strong body, so as to carry conviction to the minds of a jury, it MAY BE proof of a more satisfactory sort than that which is direct. In some lamentable instances it has been known that a short story has been got by heart by two or three witnesses; they have been consistent with themselves, they have been consistent with each

¹ *Law v. State*, 33 Tex. 37; *Jewett v. Banning*, 21 N. Y. 27; *U. S. v. Cole*, 5 McLean, 601; *U. S. v. Gilbert*, 2 Sumn. 19.

other, swearing positively to a fact, which fact has turned out afterwards not to be true. It is almost impossible for a variety of witnesses, speaking to a variety of circumstances, so to concert a story as to impose upon a jury by a fabrication of that sort, so that where it is cogent, strong, and powerful, where the witnesses do not contradict each other, or do not contradict themselves, it *MAY BE* evidence more satisfactory than even direct evidence; and there are more instances than one where that has been the case."¹ In another case the same learned judge said, "Where the proof arises from the irresistible force of a number of circumstances which we cannot conceive to be fraudulently brought together to bear upon one point, that is less fallible than under *some circumstances* direct evidence *MAY BE*."² And it has been said that the law cannot declare in general which is the more satisfactory by any defined combinations of facts, so much does the question depend upon the minute and peculiar circumstances incident to each case.³ It has been held improper to charge that direct testimony is always the more satisfactory.⁴ On the other hand, a charge that "the law makes no distinction between circumstantial and positive evidence," is faulty. It is too broad; and, especially in the absence of any caution by the court as to the care to be used in applying such evidence, is it liable to mislead.⁵ Some instructive remarks on this subject were made in a recent celebrated case by a learned judge of the New York Court of Appeals:⁶

"All evidence is, in a strict sense, more or less circumstantial,⁷ whether consisting in facts which permit the inference of guilt, or given by eyewitnesses of the occurrence; for the testimony of eyewitnesses is, of course, based upon circumstances more or less distinctly and directly observed. But of course there is a difference between evidence consisting in facts of a peculiar nature, and hence giving rise to presumptions, and evidence which is di-

¹ *Rex v. Patch*, Surrey Spring Assizes, 1806.

² *Rex v. Smith*, for arson, Old Bailey, June 15, 1813. Shorthand Report by Gurney.

³ *State v. Van Winkle*, 6 Neb. 344, quoting Starkie.

⁴ *People v. Johnson*, 140 N. Y. 350; 55 N. Y. S. R. 733.

⁵ *Burt v. State* (Miss.), 16 So. 342.

⁶ Remarks of GRAY, J., in *People v. Harris*, 136 N. Y. 423.

⁷ See also remarks of GIBSON, C. J., in *Com. v. Harnan*, 4 Pa. 269: "The difference being only in degree."

rect as consisting in the positive testimony of eyewitnesses ; and the difference is material according to the degree of exactness and relevancy, the weight of the circumstances, and the credibility of witnesses. The mind may be reluctant to conclude upon the issue of guilt in criminal cases upon evidence which is not direct, and yet if the facts brought out, when taken together, all point in the one direction of guilt, and to the exclusion of any other hypothesis, there is no substantial reason for that reluctance. Purely circumstantial evidence may be often more satisfactory and a safer form of evidence, for it must rest upon facts which, to prove the truth of the charge made, must collectively tend to establish the guilt of the accused. For instance, if any of the material facts of a case were at variance with the probabilities of guilt, it would be the duty of the jury to give to the defendant the benefit of the doubt raised. A fact has the sense of, and is equivalent to, a truth, or that which is real. It is in the ingenious combination of facts that they may be made to deceive, or to express what is not the truth. In the evidence of eyewitnesses to prove the facts of an occurrence, we are not guaranteed against mistake and falsehood, or the distortion of truth by exaggeration or prejudice ; but when we are dealing with a number of established facts, if, upon arranging, examining, and weighing them in our mind, we reach only the conclusion of guilt, the judgment rests upon pillars as substantial and sound as though resting upon the testimony of eyewitnesses."

In truth, direct and circumstantial evidence ought not to be placed in contrast, since they are not mutually opposed ;¹ for evidence of a circumstantial and secondary nature can never be justifiably resorted to, except where evidence of a direct and, therefore, of a superior nature is unattainable.²

And when, in the nature of the case, direct evidence is not to be had there ought to be no hesitancy in resorting to circumstantial evidence ; for, as has been pointed out, this kind of evidence may be as conclusive as the higher class. Circumstantial evidence must generally be relied on to establish adultery.³ Direct proof is not requisite to establish a conspiracy : it may be shown by inference from facts and circumstances.⁴ And

¹ *Terr. v. Egan*, 3 Dak. 119.

² *Stark, on Ev.* (10th Am. Ed.) 874.

³ *Cooke v. Cooke*, 152 Ill. 286.

⁴ *Grimes v. Bowerman*, 92 Mich. 458 ; *Redding v. Wright*, 49 Minn. 322.

fraud may be as properly established by circumstantial evidence, as by presenting the more positive and direct testimony of actual purpose to deceive. Indeed, in most cases circumstantial proof can alone bring fraud to light. Fraud is peculiarly a wrong of secrecy and circumvention, and is to be traced not in the open proclamation of the wrong-doer's purpose, but by the indications of covered tracks and studious concealments. The court or jury must be cautious in deducing the fraud.¹

The argument founded upon the abundance of the circumstances, and the consequent opportunities of contradiction which they afford, belongs to another part of the subject. While each of these incidents adds greatly to the probative force of circumstantial evidence in *particular* cases, they have clearly no connection with an inquiry into the value of circumstantial evidence in the *abstract*. However numerous may be the independent circumstances to which the witnesses depose, the result cannot be of a different kind from, or superior to, that strong moral assurance which is the consequence of satisfactory proof by direct testimony, and for which, if such proof be attainable, every tribunal, every reasonable mind, would reject any attempt to substitute indirect or circumstantial evidence, as inadmissible, and as affording the strongest reason for suspicion and disbelief.

It has been said that "though in most cases of circumstantial evidence there be a *possibility* that the prisoner may be innocent, the same often holds in cases of direct proof, where witnesses may err as to identity of person, or corruptly falsify, for reasons that are at the time unknown."² This observation is unquestionably true. Even the testimony of the senses, though it affords the safest ground of moral assurance, cannot be implicitly depended upon, even where the veracity of the witnesses is above all suspicion. An eminent barrister, a gentleman of acute mind and strong understanding, swore positively to the persons of two men, whom he charged with robbing him in the open daylight. But it was proved by conclusive evidence that the men on trial were, at the time of the robbery, at so remote a distance from the spot that the thing was im-

¹ Cooley's Elements of Torts, 191. And see *Sturm v. Chalfant* (W. Va.), 18 S. E. 451; *Barndt v. Frederick*, 78 Wis. 1; 11 L. R. A. 199; *Gumberg v. Treusch* (Mich.), 61 N. W. 872.

² Burnet, C. L. of Scotland, 524.

possible. The consequence was that they were acquitted, and some time afterwards the robbers were taken, and the articles stolen found upon them. The prosecutor, on seeing these men, candidly acknowledged his mistake, and it is said gave a recompense to the persons he prosecuted, and who so narrowly escaped conviction.¹ It is probable that he was deceived by the broad glare of sunlight, but there can be no doubt of the sincerity of his impressions.

Many similar instances are upon record of the fallibility of human testimony, even as to matters supposed to be grounded upon the clearest evidence of the senses, and where the misconception has related to the substantive matters of judicial inquiry. It has been said with the strictest philosophical truth, that "proof is nothing more than a presumption of the highest order."² But these considerations, instead of establishing the superior efficacy of circumstantial evidence, seem irresistibly to lead to the conclusion that it is, *à fortiori*, more probable that similar misconception may take place as to *collateral* facts and incidents, to which, perhaps, particular attention may not have been excited.

There is another source of fallacy and danger to which, as already intimated, circumstantial evidence is peculiarly liable, and of which it is necessary to be especially mindful. Where the evidence is direct, and the testimony credible, belief is the immediate and necessary result; whereas, in cases of circumstantial evidence, processes of inference and deduction are essentially involved, frequently of a most delicate and perplexing character, liable to numerous causes of fallacy, some of them inherent in the nature of the mind itself, which has been profoundly compared to the distorting power of an uneven mirror, imparting its own nature upon the true nature of things.³ Mr. Baron Alderson, upon a trial of this kind, said: "It was necessary to warn the jury against the danger of being misled by a train of circumstantial evidence. The mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious

¹ *Rex v. Wood & Brown*, 28 St. Tr. 819.

² Lord Erskine in the Banbury Peerage Case.

³ *Novum Organum*, lib. i. Aph. 41, 45; *Best on Presumptions*, 255; and see 3 Bentham's *Jud. Ev.* b. v. c. xv. § iv.

the mind of the individual, the more likely was it, in considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories, and necessary to render them complete.”¹ Circumstantial evidence, therefore, must always be scanned with great caution.²

It may be objected that the foregoing observations tend to create distrust in all human testimony. While it must be admitted that the senses cannot be implicitly depended upon, it is certain that their liability to mistake may be greatly diminished by habits of accurate observation and relation. The general conformity of our impressions to truth and nature, and the universal opinion and practice of mankind, establish the reasonableness and propriety of our faith in testimonial evidence. The interest to which all controverted matters of fact give occasion is a manifestation of the preference in the human mind of truth to falsehood; and, finally, the number of mistaken inferences from the testimony of the senses is inconceivably small, as compared with the almost infinite number of judgments which are correctly drawn from evidence of the kind in question.

¹ *Reg. v. Hodges*, 2 Lewin's C. C. 227.

² *Dean v. Com.*, 82 Grat. 912.

CHAPTER IV.

THE SOURCES OF CIRCUMSTANTIAL EVIDENCE.

IN the present state of knowledge there can be little danger of mistake as to the legitimate subjects of human belief; but how melancholy is the degradation of the human intellect exhibited in the records of superstition, imposture, and delusion, of enthusiasm and credulity, of judicial darkness and cruelty, in the pages of our own history, as well as in those of every other nation!

A profound ignorance of the laws of nature, an inability to account for the origin of evil, and to reconcile its existence with the Divine attributes, and the impulse to avenge wrongs for which human institutions afforded no remedy, led to a universal belief in the supernatural interposition of the Supreme Being on behalf of his injured moral offspring. Of this persuasion, augury, divination, judicial combat, the various forms of trial by ordeal, the supposed intimations of truth conveyed by means of apparitions and dreams, the bleeding of a corpse in the presence of the murderer, and his reluctance to touch it,¹ were thought to be so many manifestations; while, with the wildest inconsistency, the belief was equally general in the existence and influence of witchcraft, and other modes of demoniacal agency over the minds and actions of men. The history of all nations affords lamentable memorials of judicial murders, the natural consequences of such mistaken and degrading views. Without adverting to other reasons, it is conclusive against all departure by the Supreme Being from the ordinary course of his administration, that so many instances of erroneous conviction and execution have occurred in all ages and in all countries.

The course of external nature, and the mental and physical constitution of man, and his actions and moral and mechanical

¹ *Rex v. Standsfield*, 11 St. Tr. 1403, and *Rex v. Okeman*, 14 Id. 1324.

relations, are the only true sources of those facts which constitute circumstantial evidence.

In every inquiry into the truth of any alleged fact, as to which our means of judgment are secondary facts, there must exist relations and dependencies, inseparable from the principal fact, which will commonly be manifested by external appearances. No action of a rational being is indifferent or independent; and every such action must necessarily be connected with antecedent, concomitant, and subsequent conditions of mind, and with external circumstances, of the actual existence of which, though it may not invariably be apparent, there can be no doubt.

A crime, so far as it falls within the cognizance of human tribunals, is an *act* proceeding from a wicked *motive*; it follows, therefore, that in every such act there must have been one or more voluntary agents; that it must have had corresponding relations to some precise moment of time and portion of space; that there must have existed inducements to guilt, preparations for, and objects and instruments of crime; these, the acts of disguise, flight, or concealment, the possession of plunder or other fruits of crime, and innumerable other particulars connected with individual conduct, and with moral, social, and physical relations, afford materials for the determination of the judgment.

In a case depending on circumstantial evidence, the mind seeks to explore every source from which any light, however feeble, may be derived; and the jury in such a case should have before them every fact, however slight, which may aid them in coming to a satisfactory conclusion.¹ As jurors have become more capable of exercising their functions intelligently, judges, both in England and in this country, have struggled to open the door as wide as possible, and to let in all facts calculated to affect the minds of the jury in arriving at a correct conclusion.² The nature of the case in many instances demands a greater latitude in the presentation of the evidence of circumstances than where a conviction is sought upon direct testimony.³

¹ *Cooper v. State*, 19 Tex. 449. See *Noftsinger v. State*, 7 Tex. Crim. App. 301; *Hart v. State*, 15 Id. 202; *Preston v. State*, 8 Id. 30; *Bouldin v. State*, 8 Id. 332; *Howard v. State*, 8 Id. 53; *State v. Reno*, 67 Id. 587; *State v. Rhodes* (N. C.), 15 S. E. 1038; *Holmes v. Goldsmith*, 147 U. S. 150; 37 L. Ed. 118.

² *Johnson v. State*, 14 Ga. 55.

³ *Ballew v. State*, 36 Tex. 98.

It is of the essence of justice that no facts or circumstances shall be excluded from the jury which have relation to or bear upon the principal fact: not facts which owe their origin to subsequent events, but such as were of necessity connected with or could have had no existence except for the principal fact.¹ It is understood that when the case is obscure and guilt is to be established by conclusions or presumptions arising from circumstances, and there is a doubt as to the admissibility of evidence, the doubt should be resolved *in favorem vitæ et libertatis*.² The jury must be trusted to distinguish the significant from the unimportant facts in a case.³

For instance, in an action to recover the value of a horse alleged to have been killed by the defendant, it was relevant and competent to show that the defendant had some motive as well as an opportunity to kill the horse, by showing that the horse was in the habit of trespassing, and did, immediately before he was killed, trespass upon the defendant's corn crop.⁴

On a trial for the larceny of a horse, where it was claimed that the defendant had taken the horse from the pasture-field, it having been shown that the horse was found in the possession of the defendant, it was held proper to prove that the horse had failed to come to the stable at night, as was his habit, as a slight circumstance to be taken in connection with the other fact.⁵

On an indictment for burglary it is proper to be shown for the consideration of the jury, that the defendant knew there was money in the house.⁶

Evidence tending to show defendant's presence near the scene of the homicide on the night it occurred is admissible on a trial for murder.⁷ On a trial for murder by drowning persons in a boat, evidence that defendant possessed an augur corresponding in size to holes bored in the boat a short time before the crime was committed, is admissible.⁸

But it would be impracticable to enumerate the infinite variety of circumstantial evidentiary facts, which of necessity are

¹ *People v. O'Neil*, 6 N. Y. Cr. R. 274.

² *Pharr v. State*, 9 Tex. Crim. App. 129.

³ *People v. Bemis*, 51 Mich. 422.

⁴ *Gannon v. Stevens*, 13 Kan. 447.

⁵ *Johnson v. State*, 47 Ala. 62.

⁶ *State v. Kepper*, 65 Ia. 745.

⁷ *Reynolds v. State* (Fla.), 16 So. 78.

⁸ *Nicholas v. Com.* (Va.), 21 S. E. 364.

as various as the modifications and combinations of events in actual life. As was well said by an eminent philosopher and statesman, "All the acts of the party, all things that explain or throw light on these acts, all the acts of others relative to the affair, that come to his knowledge and may influence him; his friendships and enmities; his promises, his threats, the truth of his discourses, the falsehood of his apologies, pretences, and explanations; his looks, his speech, his silence where he was called to speak; everything which tends to establish the connection between all these particulars; every circumstance, precedent, concomitant, and subsequent, become parts of circumstantial evidence. These are in their matter infinite, and cannot be comprehended within any rule, or brought under any classification."¹

¹ 2 Burke's Works, *ut supra*, 623.

PART II.

INCULPATORY INDICATIONS.

DIVISION I.

INCULPATORY MORAL INDICATIONS.

INTRODUCTORY REMARKS.

It is not necessary, in a work of this nature, nor, for reasons which have been explained, is it practicable, to set forth a complete enumeration of facts as invariably conjoined with authoritative presumptions. Nevertheless, in connection with the following statement of the general principles which determine the relevancy and effect of circumstantial evidence, there will be noticed, by way of illustration, some particulars of moral conduct, which have been considered, by the tribunals which have had occasion to consider their effect, as leading to important and well-grounded presumptions.

CHAPTER I.

MOTIVES TO CRIME.

As there must pre-exist a motive to every voluntary action of a rational being, it is proper to comprise in the class of moral indications such particulars of external relations as are usually observed to operate as inducements to the commission of crime, as well as such indications from language and conduct as more directly and unequivocally manifest a connection between the deed and the mind of the actor. In strictness the word "motive," though popularly applied to denote the external objects potentially calculated to act on the mind, ought to be limited to the designation of such objects only as have actually influenced the will, as the efficient causes of moral action.

The metaphorical origin of this word has given rise to serious misconception as to the nature of moral and legal responsibility, upon which it is essential that our conceptions should be accurate. From its primary application to material force, an imaginary analogy has been supposed between the action of moral and physical agencies. In reality, however, there is no resemblance between the fatal and irresistible constraint of mechanical power and the influence of motives on the self-organating will of an intelligent and free agent. MAN is not the passive subject of necessity or chance; nor are his moral judgments merely the abstractions of logic; on the contrary, he is endowed with instincts, passions, and affections, and above all with reason, and the capacity of estimating the qualities and tendencies of his volitions and actions, and with the power of choosing from among the various inducements, emotional and rational, which are presented to him, the governing principles of his conduct.¹ Mankind are moved by certain passions, feelings, and motives. Under given circumstances men

¹ 6 Stewart's Collected Works, 349; Cousin, Cours de l'Hist. de Philosophie, prem. sér. tome 4, Leçon xxiv.

will act in a certain way, which is indicated as ascertained by experience and common sense.¹

These considerations constitute the foundation of moral and legal responsibility ; and it follows from them, that in all their important actions we naturally, reasonably, and safely judge of men's motives by their conduct, as we conclude from the nature of the stream the qualities of its source. The various springs by which human motives are supplied are frequently difficult to trace.² It is indispensable, therefore, in the investigation of imputed guilt to look at all the surrounding circumstances which connect the actor with other persons and things, and may have operated as motives and influenced his actions. And the prosecution may offer any evidence tending to prove a motive for the commission of the crime.³ On a trial for murder whatever tends to show defendant's feeling toward the person killed is admissible.⁴ All testimony tending to show motive is material to the issue.⁵

It is of the essence of moral weakness that it forms a mistaken estimate of present good, and a want of proportion will, therefore, of necessity be found between the objects of desire and the means employed to obtain them. It is impossible to see the operations of the human mind. The characters, instincts, and intents of persons differ so, that what might be an adequate motive for one, for a certain act, will not be for another.⁶ The motive need not be commensurate with the crime.⁷ The assassin's dagger may be put into requisition for a few pieces of gold, and the difference between that and other inducements to crime is a difference only of degree. Indeed, tried by the strict rules of morality, there can be no such thing as an adequate motive to the commission of crime.

The common inducements to crime are, the desire of revenging some real or fancied wrong ;⁸ of getting rid of a rival⁹ or

¹ LUDLOW, P. J., in *Com. v. Cullen*, 30 Leg. Int. 252.

² *Hunter v. State*, 43 Ga. 488.

³ *State v. Lackin*, 11 Nev. 814 ; *Hart v. State*, 15 Tex. App. 202.

⁴ *People v. Kern*, 61 Cal. 244 ; *Marler v. State*, 67 Ala. 55 ; *State v. Gooch*, 94 N. C. 987 ; *Wellar v. People*, 30 Mich. 16.

⁵ *Fraser v. State*, 55 Ga. 325 ; *McCue v. Com.*, 78 Pa. St. 185.

⁶ PLATT, J., in *People v. Rubenstein*, New York Oyer and Terminer, cited in *Rice on Crim. Ev.* § 344.

⁷ *Whart on Homicide*, § 670 a ; *Cheverins v. Com.*, 8 Crim. L. Mag. 760.

⁸ *Kelly v. State*, *Dean v. Com.*, *Breedlove v. State*, and *Fraser v. State*, *infra*.

⁹ *Hunter v. State*, *infra*.

an obnoxious connection ;¹ of escaping from the pressure of pecuniary or other obligation or burden ;² of obtaining plunder or other coveted object ;³ of preserving reputation, either that of general character, or the conventional reputation, of profession or sex ;⁴ or of gratifying some other selfish or malignant passion.

That there has been an indictment found against the defendant's brother for theft from the deceased, is a fact proper to be shown.⁵ That the defendant was indicted and punished at the instance of the deceased is material as it goes to show a motive for anger expressed by the defendant.⁶ In a recent case where the defendant was tried for the murder of A., who was shot from ambush while sitting on the veranda of a house with one K., and the theory of the prosecution was that the defendant had intended to shoot K., to connect the defendant with the crime and support this, it was proved that the defendant had heard that K. had committed adultery with the defendant's wife.⁷

In another case, the defendant, whose wife was dead, had cohabited illicitly with one of his step-children and had sought to marry her. The children had all refused to live with him longer, and had been sheltered by the deceased. The defendant had made many, but futile, efforts to get them back. These facts were admitted in evidence.⁸

In a recent case, where the prisoner was on trial for the murder of the watchman of a mill in which the defendant had formerly been employed, the deceased was found lying in his blood, with his skull crushed in, on the floor of the mill, and beside him a pair of heavy tongs which were in constant use in the mill, and with which the wounds had evidently been inflicted. The theory of the prosecution was that the prisoner, while in the mill at night for a criminal purpose, had been

¹ *State v. Moxley*, *People v. Hendrickson*, *Shaw v. State*, *State v. Jones*, *State v. Kennedy*, *McMeen v. Com.*, *Pate v. State*, *Siebert v. People*, *Mack v. State*, *State v. Watkins*, *People v. Kesler*, *Wharton v. State*, *infra*.

² *State v. Rainsbarger*, *People v. Hendrickson*, *infra*.

³ *Roe v. State*, *Marion v. State*, *infra*.

⁴ *State v. Posey*, *Cheverins v. Com.*, *infra*.

⁵ *Coward v. State*, 6 Tex. Crim. App. 59.

⁶ *Kelly v. State*, 49 Ga. 12. And see *Carter v. People* (Ill.), 37 N. E. 244. See also *Dean v. Com.*, 32 Grat. 912.

⁷ *Breedlove v. State*, 26 Tex. App. 445.

⁸ *Fraser v. State*, 55 Ga. 325.

overtaken by the watchman going his rounds, and to shield himself from detection had killed the latter. And it was permitted to be shown that the accused had been recently discharged from the mill, and that he made threats of vengeance, and that he had said that if the machinery got out of order he was the only person in town who could fix it.¹

It may be shown in the trial of one accused of murder that the defendant believed that a charge of larceny brought against him by the deceased was the cause of his losing his position.² So, also, that the defendant is the paramour of a woman whom the deceased assaulted in the defendant's presence.³

On the trial of accused for the murder of a slave circumstances were allowed to be proved, as showing a motive for the crime, which tended to show that, a short time previously, the accused had procured the murder of his wife by the slave.⁴ In a trial for the murder of a young woman, a letter by the prisoner to the deceased describing the seduction of a woman was admitted, as tending strongly to show that the accused was the seducer of the deceased, where it appeared that the deceased was pregnant at the time of her death.⁵

Perhaps no motives are more difficult to trace than those having their fountainhead in envies and jealousies which agitate the human heart. Where the defendant was on trial for the murder of the accepted suitor of a young woman who had rejected the defendant, for the purpose of showing motive upon the part of the accused, it may be shown that there was a rumor of the approaching marriage of the deceased to the young woman, and that the rumor reached the ears of the defendant.⁶

Where one is accused of the murder of a wife, the marital relation affords a strong presumption of his innocence. In the absence of proof to the contrary, it is to be presumed that he loves her and will protect her. In a case where the evidence was wholly circumstantial, and it was shown on the trial that the accused had always borne a good character, and that he

¹ *People v. Hand* (Mich.), Washtenaw Co., Jan., 1894.

² *State v. Palmer*, 65 N. H. 216.

³ *State v. Lawlor*, 28 Minn. 216.

⁴ *State v. Posey*, 4 Strobh. 142.

⁵ *Cheverins v. Com.*, 8 Cr. L. Mag. 760.

⁶ *Hunter v. State*, 43 Ga. 488.

had always lived with his wife peaceably and happily, the Supreme Court, in reviewing the case, said that the defendant was entitled not only to the ordinary presumption of innocence, but to the additional "and equally favorable presumption" arising in consequence of the marital relations existing between the parties.¹ It is important, therefore, for the prosecution, if it can, to repel this presumption by proof that the defendant has disregarded the claims of connubial duty. For this purpose evidence tending, however slightly, to show an alienation of affection—anything from which a jury may infer a desire to be free from the burden of one who is no longer the object of his regard—is competent. Any conduct or declarations evincing unkindness or disrespect are admissible, as tending to show the state of the defendant's feelings toward his wife.² Where one testified that the two were quarrelling on the morning of the murder, evidence was admissible to show a bad state of feeling always existing.³ And it may be proved that defendant had previously asked his wife to consent to a divorce, and she had refused.⁴ On the other hand, evidence that the murdered wife had applied for a divorce is admissible, though the allegations supporting the application may not be shown.⁵ Proof of their previous unhappy relations, and of his expressions of discontent, is admissible.⁶ And where it had been proved that poison sent to the deceased by her husband was the cause of her death, the prosecution was allowed to show profane threats made by him against her a short time previously.⁷

On a trial for murder, to prove motive, it may be shown that unlawful relations existed between the defendant and the wife of the deceased; and this may be shown by the acts of the parties.⁸ And where a woman and her paramour were on trial for the murder of the former's husband, evidence that the defendants had been guilty of adultery during the lifetime of the deceased was admitted.⁹ In another case, where a woman

¹ *State v. Moxley*, 102 Mo. 374.

² *People v. Hendrickson*, 1 Park. Cr. R. 406; *State v. Moelchen*, 53 Ia. 310; *State v. Cole*, 63 Ia. 695.

³ *Shaw v. State*, 60 Ga. 247.

⁴ *State v. Jones*, 3 S. E. 507.

⁵ *Pinckford v. State*, 13 Tex. Crim. App. 468.

⁶ *State v. Kennedy*, 77 Ia. 208.

⁷ *McMeen v. Com. (Pa.)*, 5 Cent. 887.

⁸ *Pate v. State*, 94 Ala. 14; *State v. Reed*, 53 Kan. 767.

Siebert v. People, 143 Ill. 571.

was tried for the murder of her husband, it was shown, not only that she had been carrying on an adulterous intercourse, but that the kindly feelings ordinarily existing between persons sustaining the marital relation had ceased to exist, and that she looked upon her husband with hatred and contempt.¹

Proof that he had been guilty of adultery would not establish the position that the husband had done the killing, but the presumption created by the marital relation would be repelled, and a weight be given to the other proof which it would not otherwise possess.²

In an early case in New York it appeared that the defendant had, during the lifetime of his wife, made offers of marriage to another woman who had given him "no great encouragement." From the fact that this woman had not emphatically discountenanced his advances, it was inferred that the only obstacle was the existing marriage. A short time after these proposals the death of the wife occurred under the following circumstances: After desertion of his wife from the date of their marriage for about five years, he appeared at the house where deceased was living, with offers of reconciliation, and took her home under pretense of wishing to live with her. On their journey toward the place where he said he had procured a home, he led her a distance from the direct route to an obscure tavern in an unfrequented neighborhood. While at this place she was taken sick. The prisoner declined to send for a physician when strongly pressed to do so by the family in the house, and refused offers of assistance and nursing. He procured excessive quantities of opium, and administered a puke when the deceased was apparently convalescing. No one but him administered medicine during the illness. He affected ignorance of the relatives of the deceased, and had her buried in the neighborhood instead of carrying her body to her relatives, as she had requested. The body having been disinterred for examination, traces of poison were found in her stomach. The accused was brought to trial and convicted.³

In another case, where a conviction was had upon evidence entirely circumstantial, the evidence showed that, about eighteen months before the killing, there had been a separation be-

¹ Mack v. State, 48 Wis. 271.

² State v. Watkins, 9 Conn. 47.

³ People v. Kesler, 8 Wheel. Cr. Cas. 18.

tween the defendant and his wife, and he had declared among other things that "he did not like her," and "would not live with her." The defendant introduced evidence showing that the marital relations were resumed a short time before the killing, and that they were living together at that time. There was no proof of the extent or *bona fide* of the alleged reconciliation. These facts were relevant as tending to prove a pacification, entirely oblivious of past vindictiveness. But the jury were not compelled to believe that such was the case, and an instruction was properly refused to the effect that, "although they might believe from the evidence that, before the killing, the defendant and his wife separated, yet if they believed that before the killing they had become reconciled, and were living together, then the law presumes there was no malice or ill-will between the parties at the time of the killing from the fact of such separation and statements; and the State cannot rely on this fact and statement to show a motive in the defendant to kill his wife, if he did kill her."¹

On the trial of a husband for the murder of his wife, it may be shown that pecuniary expectations, which the defendant entertained by reason of the marriage, had been disappointed.²

There are many instances of cases where the presumable motive has been to obtain the insurance on the life of the deceased.³ It may be shown as a motive for the killing that deceased was a burden on defendant, and that deceased carried life insurance which defendant considered to be pledged to him to reimburse him for advances.⁴ Where the defendant was on trial for having set fire to the house in which she lived, it was suggested as a motive that she wished to realize the insurance on her furniture. To negative such a motive evidence was admitted that the defendant was in easy circumstances and never in want of money.⁵

It was lately held competent to prove that shortly before the accused and the deceased left the town where the deceased was last seen alive, the accused had purchased from the deceased, personal property, which, by the terms of a contract entered

¹ Wharton v. State, 73 Ala. 366.

² People v. Hendrickson, 1 Park. Cr. R. 406.

³ Roe v. State, 25 Tex. App. 33.

⁴ State v. Rainsbarger, 74 Ia. 196 539.

⁵ Reg. v. Grant, 4 F. & F. 322. And see Farmers' Ins. Co. v. Gargett, 42 Mich. 289.

into between them, was to continue in the possession of deceased until paid for by the accused; and that a few days after their departure together the accused returned alone with the property.¹ Where the theory of the State was that the murder was committed to enable the prisoner to get his brother's property, evidence of their business and social relations for a reasonable time before was held admissible.²

When the case depends on circumstantial evidence, and the circumstances point to any particular person as the criminal, the case against him is much fortified by proof that he had a motive to commit the crime.³ Says Roscoe, speaking of the crime of murder: "It is but reasonable, in a case of doubt, to expect that some motive, and that a strong one, should be assigned as an inducement to commit an act from which our nature is abhorrent, and the consequence of which is usually so fatal to the criminal."⁴ It is always a satisfactory circumstance of corroboration when, in connection with convincing facts of conduct, an apparent motive can be assigned. But, as the operations of the mind are invisible and intangible, it is impossible to go further; and it must be remembered that there may be motives which no human being but the party himself can divine. And, therefore, the prosecution is never bound to establish an adequate motive,⁵ nor, indeed, any motive at all, for the alleged crime. The fact of homicide, for instance, being established, the inability to discover the motive does not disprove the crime.

Nor must undue importance be attached to external circumstances supposed to be indicative of guilty motive, for there are few men to whom some or other of the forms of crime may not apparently prove advantageous. Neither ought the existence of such apparent inducements to supersede the necessity for the same amount of proof as would be deemed necessary in the absence of all evidence of such a stimulus. Suspicion, too readily excited by the appearance of supposed inducement, is incompatible with that even and unprejudiced state of mind which is indispensable to the formation of correct and sober judgment. While true it is that frequently "imputation and

¹ *Marion v. State*, 20 Neb. 233.

² *Clough v. State*, 7 Neb. 320. See *Murphy v. People*, 63 N. Y. 590.

³ *EARL, J.*, in *Pierson v. People*, 70 N. Y. 436.

⁴ *Roscoe, Cr. Ev.* (8th Am. Ed.) 943. ⁵ *McLain v. Com.*, 99 Pa. St. 86.

strong circumstances . . . lead directly to the door of truth," it is equally true that entirely to penetrate the mind of man is out of human power, and that circumstances which apparently have presented powerful motives, may never have acted as such. Who can say that some "uncleanly apprehension," some transient thought of sinister aspect, in the dimness of moral light momentarily mistaken for good, may not float unbidden across the purest mind? And how often is it that man has no control over circumstances of apparent power over his motives?

It follows from the foregoing remarks that evidence of collateral facts which may appear to have presented a motive for a particular action deserves *per se* no weight. With motives merely the legislator and the magistrate have nothing to do; ACTIONS, AS THE OBJECTS OR RESULTS OF MOTIVES, are the only legitimately cognizable subjects of human law. *Actus non facit reum nisi mens sit rea* is a maxim of reason and justice not less than of positive law.¹ Motives and their objects differ, it has been remarked, as the springs and wheels of a watch differ from the pointing of the hour, being mutually related in like manner.² But such evidence is most pertinent and important when clearly connected with declarations which demonstrate that the particular motive has passed into action, or with inculpatory moral facts which it tends to explain and co-ordinate, and which would otherwise be inexplicable. But care must be exercised not to open too wide a field for extrinsic explanation. To let in collateral facts the court must be able to perceive that they tend naturally to elucidate the act or intent charged. Each case must depend, in a large degree, on its own attending facts and circumstances.³

The particulars of external relation and moral conduct will in general correctly indicate the character of the motive in which they have originated. On the other hand, the entire absence of surrounding circumstances, which on the ordinary principles of human nature may reasonably be supposed to have acted as an inducing cause, is justly regarded, whenever upon the general evidence the imputed guilt is doubtful, as affording a strong presumption of innocence.⁴

It occasionally happens that actions of great enormity are

¹ 3 Inst. 107.

² Hampden's Lect., *ut supra*, 241.

³ 1 Brick. Dig. 505, § 823 *et seq.* Durett v. State, 72 Ala. 404.

⁴ People v. Rubenstein, *supra*.

committed, for which no apparent motive is discoverable. It must not be concluded, however, that no pre-existent motive has operated; and upon principles of reason and justice essential to common security, unless it is clearly and indubitably shown that the actor is bereft of reason and moral power, he is held to be legally accountable for his actions.¹ Crimes the most horrible are often committed without apparent motive save to gratify an inherent passion for wickedness which mocks at social restraint and recklessly defies the laws of God and man. While in cases depending upon circumstantial evidence the existence or want of motive is sometimes of vital importance, yet the indication of the law is not made to rest upon so narrow and frail a foundation, nor can the demands of justice be met and foiled by an averment that no motive for the prisoner's conduct has been made to appear.² But a sense of injury, and long-cherished feelings of resentment, may ultimately induce a state of mind independent of self-restraint, and render their victim the sport of ungovernable impulses of passion;³ but the distinction is evident and just between such actions as are the consequences of a voluntary abdication of moral control, and actions committed under the over-mastering power of a delusion of the imagination, which, though groundless, operates upon the mind with all the force of reality and necessity.⁴

Lord Chief Justice Campbell, on a trial for murder, thus summed up the doctrine under discussion: "With respect to the alleged motive, it is of great importance to see whether there was a motive for committing such a crime, or whether there was not;⁵ or whether there is an improbability of its having been committed so strong as not to be overpowered by positive evidence. But if there be any motive which can be assigned, I am bound to tell you that the adequacy of that motive is of little importance. We know, from the experience of criminal courts, that atrocious crimes of this sort have been committed from very slight motives; not merely from malice and re-

¹ *State v. Dill*, 18 Atl. 763.

² *People v. Robinson*, 1 Park. Cr. R. 655; *Preston v. State*, 8 Tex. Crim. App. 80.

³ *Rex v. Earl Ferrers*, 19 St. Tr. 885.

⁴ *Rex v. Hadfield*, 27 St. Tr. 1281; *Rex v. Martin*, York Sp. Ass. 1881, Shorthand Rep. by Fraser; *Rex v. Offord*, 5 C. & P. 168.

⁵ *Lake v. People*, 1 Park. Cr. R. 495.

venge, but to gain a small pecuniary advantage, and to drive off for a time pressing difficulties.”¹

It is a general rule for the interpretation of conduct as indicative of motives, demanded by social security and founded on substantial justice, that every man shall be held to have intended, and therefore to be legally accountable for, the natural and probable consequences of his actions;² and no one can be permitted to speculate with impunity upon the precise extent to which he may securely carry his mischievous intentions, the reality and degree of which it is alike impossible to determine. If, therefore, the motive have been to commit, not the particular crime, but another of equal legal degree, then the maxim applies that *in criminalibus sufficit generalis malitia intentionis cum facto paris gradus*.³ “All crimes,” says Bacon, “have their conception in a corrupt intent, and have their consummation and issuing in some particular fact, which, though it be not the fact at which the intention of the malefactor levelled, yet the law giveth him no advantage of the error, if another particular occur of as high a nature. Therefore, if an empoisoned apple be laid in a place to empoison J. S., and J. D. cometh by chance and eateth of it, this is murder in the principal, that is *actor*, and yet the malice *in individuo* was not against J. D.”⁴ On an indictment for disposing of a forged bank-note with intent to defraud, it was held, that the jury ought to infer an intent to defraud the person who would have to pay the instrument if genuine, although from the manner of executing the forgery, or from that person’s ordinary caution, it would not be likely to impose upon him, and although the object was general to defraud whoever might take the instrument, and the intention of defrauding the person in particular who would have to pay the instrument if genuine, did not enter into the prisoner’s contemplation.⁵

¹ Reg. v. Palmer, Shorthand Report, 368.

² Rex v. Farrington, R. & R. 209; Rex v. Harvey, 2 B. & C. 257; Rex v. Dixon, 2 M. & S. 11; Hill v. Com., 2 Grat. 594. Uttering a forged stock-receipt to a person who employed the prisoner to buy stock to that amount and advanced the money, is sufficient evidence of an intent to defraud that person; and the oath of the person to whom the receipt was uttered, that he believes the prisoner had no such intent, will not repel the presumption. Rex v. Sheppard, R. & R. C. C. 169.

³ Bacon’s Max. Reg. xv.

⁴ Bacon’s Max. Reg. xv.

Rex v. Mazagora, R. & R. C. C. 291.

"In capital cases," declares the high authority quoted above, "*in favorem vite*, the law will not punish in so high a degree, except the malice of the will and intention appear."¹ The malice necessary to constitute the crime of murder is not confined to an intention to take away the life of the deceased, but includes an intent to do any unlawful act which may probably end in depriving the party of life.² The malice prepense, says Blackstone, essential to murder, is not so properly spite or malevolence to the individual in particular as an evil design in general.³ A blow with a dangerous weapon calculated to produce, and actually producing death, if struck without such provocation as reduces the crime to manslaughter, is deemed by law malicious, and the killing is murder.⁴ But nevertheless the rule under discussion has been extended beyond all reasonable application, as where two persons were convicted of lying in wait and slitting the prosecutor's nose with intent to maim and disfigure, an offence then capital by the statute 22 & 23 Car. II., c. 1, though the real intention was to commit murder in order to obtain an estate, an offence not capital, and there was no such special intent as the statute required;⁵ a case which, as extending a criminal law by equity, is inconsistent with the general principles of jurisprudence, and with the spirit of many later cases.⁶

¹ Bacon's Max. Reg. vii.

² Roscoe, Cr. Ev. (8th Am. Ed.) 954; *State v. Schoenwald*, 81 Mo. 147; *Maher v. People*, 10 Mich. 212.

³ 4 Elk. Com. 199.

⁴ U. S. v. McGhee, 1 Curt. C. C. 1.

⁵ *Rex v. Coke*, 16 St. Tr. 54.

⁶ 4 Camp. Lives of the Lord Chancellors, 601; *Rex v. Bell*, Foster's Discourses on Crim. L. App.; *Rex v. Carroll*, 2 East P. C. 400; *Rex v. Duffin*, R. & R. 385.

CHAPTER II.

THE INTENTION, AND DECLARATIONS AND ACTS INDICATIVE THEREOF.

SECTION I.

Consideration of the Principles Governing Proof of the Intent.

THOUGH malice is not presumed merely from the fact of killing, yet the circumstances attending the homicide may be such as to give rise to an inference of malice.¹ Intention, deliberation, and premeditation are operations of the mind, and their existence must be determined from the facts and circumstances of the case. The inference is one of fact only and for the jury.² Direct proof is not required, nor can it be obtained. The intent may be inferred from what the party does and says, and from all the circumstances and acts accompanying the crime. The character of the evidence is never deemed to impair the vitality of the proof.³ On a trial for homicide any facts may be proved which tend to show the intent with which it was committed.⁴ But in order that collateral facts may be admitted, the court must be able to perceive that they tend naturally to elucidate the intent charged.⁵ No strict rule can be laid down as to the character or amount of evidence necessary to show the existence of a deliberate and premeditated

¹ U. S. v. Armstrong, 2 Curt. C. C. 446; U. S. v. Mingo, 2 Curt. C. C. 1; Com. v. Hawkins, 8 Gray, 468.

² Perry v. State, 44 Tex. 478; Murray v. State, 1 Tex. Crim. App. 417; People v. Conroy, 38 Hun, 119; People v. Kelly, 35 Hun, 295.

³ Booth v. Com. 4 Grat. 525; Padgett v. State, 103 Ind. 550; State v. Woodard, 50 N. W. 885; State v. Teeter, 69 Ia. 717; State v. Munco, 12 La. Ann. 625; State v. Maxwell, 42 Ia. 208.

⁴ Austin v. State, 14 Ark. 555.

⁵ 1 Brick. Dig. § 828 *et seq.*; Durett v. State, 72 Ala. 484.

design to effect death. Each case must depend on its own facts and circumstances. One case may be proved by a long train of circumstances and events; another by a few sharp and startling facts; and in another the jury may find in the manner in which the killing was done, the weapon used, the number of blows and wounds, the time and place where effected, the disposition of the victim, everything requisite to satisfy them of the presence of deliberation and premeditation.¹

SECTION II.

Threats.

It is very common with persons who have been engaged, or are about to engage, in crime, to make obscure or mysterious allusion to their criminal acts or purposes, or to boast to others whose standard of moral conduct is the same as their own, of what they have done or will do, or to give vent to expressions of revengeful feelings² or of malignant satisfaction at the accomplishment or anticipated occurrence of some serious mischief. Such declarations or allusions are of great moment when clearly connected by independent evidence with some anterior or subsequent criminal action. And evidence of threats, general or special, or verbal indications of a similar nature, of the intended commission of a wrongful or criminal act, is admissible in criminal cases.³

When an act is of such a nature as not necessarily to imply a guilty intention, and such intention is the specific point in issue, then the evidence of declarations by the party, or of collateral circumstances, may be of the last importance, as explanatory of his motives and purposes. In regard to declarations referring to former and existing facts, Lord Chief Justice Eyre said that "Such declarations are the explanation and connection of those facts which serve to make them intelligible. What a prisoner has said respecting a particular fact is admissible evidence, not in the nature of

¹ See opinion of the court in *People v. Walworth*, 4 N. Y. Cr. R. 355. See also *R. v. Jones*, 9 C. & P. (38 E. C. L.) 258.

² *Heron v. State*, 22 Fla. 86.

³ *Culbertson v. Hill*, 87 Mo. 553; *Carver v. Heskey*, 79 Mo. 509.

a confession, but in evidence of the particular fact; and such declarations are, therefore, receivable in all cases whatever, in order to explain and to establish the state of any matter of fact which is in dispute or the subject of inquiry before a jury."¹ After one was indicted for an assault with intent to kill, and before the trial he said to the injured party, "I'll get you yet," this was held admissible as manifesting the defendant's state of feeling, not only at the time of the menace, but also at the time of the assault.² A prisoner on trial for murder returned to the place of the assault about half an hour after the engagement, and declared that he had "come to kill," and this was admitted on the trial as tending to repel the idea that the fatal blow had been struck in a sudden transport of passion.³

In Stewart's case⁴ evidence was admitted that the accused had said that he "hated all of the name of Campbell." In a recent case there was proof of a quarrel a week before the murder, and remark by the defendant, that deceased "had treated him that way two or three times, but that she could never do it again."⁵ In another case,⁶ the defendant and deceased, both negroes, had a difficulty a couple of days before the killing, when the defendant said that he "had killed two or three niggers and could kill another." In *State v. Dickson*,⁷ the defendant had said, "He shall not eat my bread and meat much longer." On a trial for the murder of a policeman, a witness was allowed to testify that he had heard the defendant say, two years before, that he "would kill any policeman who tried to arrest him again."⁸

Very often the threat is accompanied by an exhibition of, or reference to, a weapon which later on becomes the instrument of the crime. In *Benedict v. State*,⁹ the prisoner, exhibiting a knife with which he was charged with subsequently committing the murder, said it would probably be the death of some

¹ *Rex v. Crossfield*, 26 St. Tr. 215.

² *Walker v. State*, 85 Ala. 7.

³ *McManus v. State*, 36 Ala. 285. And see *Coverus v. Jones*, 61 N. H. 653.

⁴ 19 St. Tr. 100.

⁵ *Johnson v. State*, 18 Tex. App. 385.

⁶ *Jackson v. State*, 9 Tex. App. 114.

⁷ 78 Mo. 488.

⁸ *State v. Grant*, 79 Mo. 118.

⁹ 14 Wis. 459. And see *Whittaker v. Com.*, 13 Ky. L. Rep. 504; and *People v. Palmer*, 96 Mich. 580, where the deceased had not only uttered threats, but had exhibited a loaded revolver which he had recently purchased.

person before the week was out, as he "had made up his mind to kill a man."

But threats made in general terms, by the defendant, some time before the homicide, and which applied to the members of his own family, if to any one in particular, were wrongly admitted when the deceased and the defendant had been on friendly terms till the fatal meeting.¹

Threats made by the defendant against persons other than the one for whose murder the defendant is on trial are not, as a general rule, admissible.²

Threats against a particular person with whom the accused had a quarrel, might not have any weight with a jury as to the malice or intention to kill another person with whom, at the time, he had no quarrel, and whom he afterwards killed.³

On a trial where the deceased was the proprietor of a newspaper, in which had appeared an article offensive to the defendant, it was held not proper to admit evidence of a previous threat by the defendant to "get even" with the person whom he, at the time, mistakenly supposed to be the author of the article.⁴ But where one had killed an officer while resisting arrest, the prosecution was allowed to show that the defendant had said that he expected to be arrested by another officer, and, exhibiting a revolver, said that he would let him "hear from this," the threat being not so much against the latter officer as against any one who should attempt to make the arrest.⁵ And where a conspiracy has been proved to kill the deceased and others, threats made against the latter are admissible on the trial for the murder of deceased alone.⁶ And on the trial of one who was a member of a mob by whom the deceased was killed, threats made after the killing, against another person for whose destruction the conspiracy was formed, were admissible to show the character and object of the conspiracy.⁷ Threats made by the defendant against a railroad company are admissible on the trial of an indictment for an assault on an employé of the company. "It is a matter of common knowledge," said Judge Walker, in a case

¹ *State v. Crabtree*, 111 Mo. 186.

² *Carr. v. State*, 23 Neb. 749.

³ *Abernethy v. Com.*, 101 Pa. St. 322.

⁴ *People v. Powell*, 87 Cal. 348; 11 L. R. A. 75.

⁵ *Palmer v. People*, 188 Ill. 356.

⁶ *Slade v. State*, 29 Tex. Crim. App. 381.

⁷ *State v. McCahill*, 72 Ia. 111.

of this sort, "that the business of railroad companies is conducted by their employés. If threats are made against such a company, it is for the jury to determine from the character of the threats whether the employés of the company come within their scope. The company and its employés are in a measure identified, and the carrying out of a threat against the company may necessarily involve peril to or an assault upon its employés."¹

It may be shown that one who had made threats was intoxicated, that the jury may judge whether the threats were the deliberate words of a vicious man, or the coarse and idle language of a drunken man.² But the fact of intoxication, though it may lessen the weight which the jury will attach to the threat, will not render evidence of the language incompetent.³

The remoteness of threats against life from the time of the homicide is a circumstance to be considered in determining the weight and effect to be assigned them.⁴ But the remoteness or nearness of time as to threats pointing to the act subsequently committed makes no difference as to the competency of the testimony.⁵ And in the various cases cited hereto, threats made respectively one month,⁶ four months,⁷ eight months,⁸ and three years,⁹ before the commission of the offence charged, have been admitted for the consideration of the jury.

And in a late case, where there was other evidence of long-continued hostility, threats of the accused to shoot the deceased, made thirty years before the homicide, were admitted.¹⁰

In one case, where threats by the prisoner against the life of the deceased, during a period of two years, were admitted, it was well said by the court that long-continued animosity and ill-will are better evidence of a state of mind which would

¹ *Newton v. State*, 92 Ala. 33.

² *People v. Eastwood*, 14 N. Y., 562.

³ *Smith v. Com.*, 86 Ky., June 2, 1887.

⁴ *ELLIOTT, J.*, in *Goodwin v. State*, 96 Ind. 550 ; 4 Crim. L. Mag. 565.

⁵ *Carver v. Heskey*, 79 Mo. 509 ; *State v. Hoyt*, 46 Conn. 330 ; *State v. Grant*, 79 Mo. 113 ; *Keener v. State*, 18 Ga. 194 ; *State v. Ford*, 8 Strobb. 517 ; *State v. Bradley* (Vt.), 32 Atl. 288 ; 64 Vt. 460.

⁶ *State v. Campbell* (S. C.), Jan. 7, 1892 ; *People v. Lyons*, 17 N. E. 791.

⁷ *Pate v. State*, *supra*.

⁸ *State v. Bradley*, 64 Vt. 466.

⁹ *Peterson v. Toner*, 80 Mich. 550.

¹⁰ *Goodwin v. State*, *supra*.

ripen into deliberate murder than the hasty ebullition of passion.¹

But evidence of such language cannot dispense with the obligation of sufficient proof of the criminal facts; for, though malignant feelings may possess the mind, and lead to intemperate and criminal expressions, they nevertheless may exercise but a transient influence, without leading to action.² It must be borne in mind, too, as in regard to the proof of language in general, that declarations may be obscure in themselves, or imperfectly remembered, and that witnesses may speak without a strict and due regard to truth.³ "Words," says Mr. Justice Foster, "are transient and fleeting as the wind; they are frequently the effect of sudden transport, easily misunderstood, and often misreported."⁴ It has been well remarked that, "Mere threats often proceed from temporary irritation without deep-rooted hostility. They indicate a rash and unguarded, rather than a determinedly malignant, character; and the very utterance of them, as every one well knows, tends to defeat their execution. The man who has resolved on a crime is more apt to keep his purpose to himself, or to confide it to an associate, under the seal of secrecy. Even the most wary, however, sometimes let their wicked purposes peep out accidentally in the freedom of companionship, or the weakness of drunken confidence. When such unguarded hints, dark and apparently unmeaning at the time, coincide with the subsequent tokens of guilt, they are strong cords in the net of criminating evidence."⁵

SECTION III.

Evidence of Previous Attempts and other Crimes.

It is not permitted in explanation of a party's motive to give evidence of a distinct and different offence committed against another person, unconnected with and unrelated to the particular

¹ *Jefferds v. People*, 5 Park. Cr. Rep. 522. See further on this point, *Terr. v. Roberts*, 9 Mont. 12; *Babcock v. People*, 18 Col. 515.

² 3 Benth. Jud. Ev. b. 5, c. 4.

³ Per DALLAS, J., in *Rex v. Turner*, 30 St. Tr. 1132.

⁴ Foster's Cr. L., *ut supra*, Disc. 1.

⁵ 1 Dickson's L. of Ev. in Scotland, 157.

act in question.¹ It is not proper to raise a presumption of guilt on the ground that, having committed one crime, the depravity it exhibits makes it likely he would commit another.² It is a well-settled rule of the criminal law that the general character of a defendant cannot be shown to be bad unless he shall first attempt to prove it otherwise. It ought not to be assailed indirectly by proof of misconduct in other transactions, even of a similar description.³

It is of the utmost importance to the accused that the facts laid before the jury shall consist exclusively of the transactions which form the subject of the indictment, and which alone he can be expected to come prepared to answer. It is not just to him to require him to answer for two offences when he is indicted for one, and thus to blacken his character and to create impressions on the minds of the jury unfavorable to his innocence.⁴ Therefore it was held that it was not competent for the prosecutor, in proof of the guilty knowledge of the prisoner, to give in evidence that, at a time previous to the receipt of the prosecutor's goods, he had in his possession other goods of the same sort as those mentioned in the indictment, but belonging to a different owner, and that such goods had been stolen from such owner.⁵ Lord Chief Justice Campbell said that "the law of England does not allow one crime to be proved in order to raise a probability that another crime has been committed by the perpetrator of the first. The evidence did not tend to show that the prisoner knew that the particular goods were stolen at the time he received them."

On a trial for stealing a watch, evidence was introduced, to prove the intent, to show that the prisoner had taken a cloak from another person. In this case a new trial was awarded.⁶ In an English case the prisoner was charged with obtaining a specific sum of money from one Hirst by false pretences. He was employed to take orders, but was forbidden to receive moneys, and he was proved to have obtained the sum from Hirst by representing that he was authorized to receive it. Evidence was then admitted of his having, within a week from

¹ *Barton v. State*, 18 Ohio, 221.

² *Shaffner v. Com.*, 72 Pa. St. 60; *Jordan v. Osgood*, 109 Mass. 457.

³ *State v. Lapage*, 57 N. H. 245.

⁴ *Trogon v. Com.*, 31 Grat. 862.

⁵ *Reg. v. Oddy*, 20 L. J. M. C. 198, and 5 Cox's C. C. 210.

⁶ *Walker v. Com.*, 1 Leigh, 574.

the above obtaining, obtained another sum of money from another person, by a similar pretence. But it was held by the Court of Criminal Appeals that such evidence was not admissible to prove the intent of the prisoner when he committed the act charged.¹

In a recent case in Massachusetts the defendant was indicted for false pretences made in the sale of a horse, and the government was permitted to offer in evidence the circumstances and details of three other sales made to different parties within a short time previously to the one which was the subject of the indictment, and the parties to such sales were permitted to testify that the pretences made by the defendant at each of these sales as to both soundness and kindness of the horses were false. This evidence, though limited in the instructions to the sole purpose of showing the intent with which the sale charged in the indictment was made, was held to have been improperly admitted.²

But to this rule there are exceptions; and, indeed, as was said in a late case, when we examine the cases bearing upon the question, it is difficult to determine which is the more extensive, the doctrine or the acknowledged exceptions.³

Lord Ellenborough, delivering the opinion in a leading criminal case,⁴ said: "If several distinct offences do intermix and blend themselves with each other, the detail of the parties' whole conduct must be pursued. There is a case where a man committed three burglaries in one night, and stole a shirt at one place and left it at another; and they were all so connected that the court heard the history of the three different burglaries."

In a recent English case the prisoner was indicted for the murder of one H., and there was another indictment pending against him for feloniously wounding W. The facts were these: The prisoner, a pawnbroker's assistant out of employment, after having spent the evening in the company of a friend in different saloons, started home alone. Between 12.30 and 1.45 A. M. he was seen going along a certain road in the direc-

¹ Reg. v. Holt, 8 Cox C. C. 411.

² Com. v. Jackson, 122 Mass. 16.

³ Trogon v. Com., *supra*.

⁴ King v. Whitney, 1 Lead. Cr. Cas. 185. And see 2 Russ. Cr. 775 *et seq.*; Reg. v. Blaesdale, 2 C. & L. 765; Mason v. State, 42 Ala. 532; Walker v. Com., 1 Leigh, 574.

tion of a hospital. At the latter hour H. was seen asleep near the doorway of the hospital. At 2.10 A. M. H. was found bleeding of a wound in the neck, of which he shortly afterwards expired. About an hour later the prisoner was seen to approach W., who was sleeping a short distance from the hospital, and strike her on the head. Being pursued and taken, there was found in his pocket a penknife, the blade of which, and a quarter of an inch of the handle, were smeared with blood. The wound inflicted on W. was a small cut at the entrance to the ear, which had severed an artery. H. had died from a wound in the neck, severing the carotid artery and entering the pharynx. The medical witnesses examined said that all the wounds might have been produced by the knife found on the prisoner, and one of them said that, the wounds of W. being superficial, the blood on the knife could not be accounted for in that way. The prosecutor, in opening the case, proceeded to narrate the circumstances of the attack on W., but the prisoner's counsel objected, submitting that this was irrelevant, and that it was not competent to give evidence of a felony other than that charged in the indictment, unless it was impossible to describe one without going into the other. Charles, J., held that the facts proposed to be detailed were necessary to explain the case, and that they ought to be admitted as "facts explaining relevant facts."¹ On a trial for the larceny of a rifle which the defendant had borrowed under the pretence of going a-hunting, evidence that the prisoner at the same time hired a horse, saying that he was going to a neighboring town, but that he went off in an opposite direction and sold the horse, was held admissible to show the intention with which the gun was borrowed.²

It would be a singular rule of law that a person accused of a grave crime could compel the exclusion of important and relevant testimony merely by committing two felonies at the same time, or so nearly and intimately connected that the one could not be proven without also proving the other. Where the defendant was accused of the theft of a horse and was traced by wagon tracks, a witness testified that he had seen the wagon, and as to peculiarities of its running, and then that the doubletrees on the wagon were the property of the witness.³

¹ Reg. v. Crickmer, 16 Cox C. C. 701. See Stephen's Dig. C. 2, Art. 9.

² White v. State, 11 Tex. 769.

³ State v. Folwell, 14 Kan. 105.

And, says Roscoe, "the notion that it is in itself an objection to the admission of evidence that it discloses other offences, especially where they are the subject of indictment, is now exploded¹ (as has been made clear by several of the foregoing illustrations). The circumstantial connection between facts of a criminal nature may be so intimate as to require proof of them all. And the prosecutor may show motive, purpose, preparation, or concealment, though it involves proof of a distinct crime. And such evidence is received to show identity of person, local proximity, or other facts calculated to connect defendant with the commission of the crime.² Evidence which tends to prove the commission of the crime charged is not incompetent merely because it tends to prove the commission by the defendant of another crime, when such evidence goes to the question of motive, intent, or guilty knowledge, or relates to a plan by which the accused procured the crime to be committed.³ On a trial for murder, evidence of criminal intimacy between defendant and the wife of the deceased, of which the deceased had knowledge, is admissible to show motive in defendant for the crime.⁴ And upon the issue whether the acts charged against him were designed or accidental, or to rebut a defence otherwise open to him, evidence tending to show other criminal acts by the defendant is admissible.⁵ On a trial for murder by drowning the deceased in a boat, evidence that defendant had previously tried to poison the deceased was held admissible to rebut the theory of accident.⁶

Express declarations of intention, or confessions, are comparatively rare; and therefore all the circumstances of the defendant's situation, conduct, speech, silence, or motives may be considered. The plan itself, and the acts done in pursuance of it, may all be proved by circumstantial evidence, if they are of themselves relevant and material to the case on trial. In such a case it makes no difference whether the preliminary acts are criminal or not. It is sometimes said that such evidence may be introduced where the several crimes form part of one entire transaction; but it is perhaps better to say where

¹ Roscoe Cr. Ev. (8th Am. Ed.) 188. And see *Thomas v. State*, 103 Ind. 419. ² *State v. Kelly* (Vt.), 27 Atl. 203; 87 Cent. L. J. 373.

³ *State v. Madigan*, 57 Minn. 425.

⁴ *State v. Reed*, 53 Kan. 767; *State v. Phelps* (S. D.), 59 N. W. 471.

⁵ *Makin v. New South Wales* (L. R. 1894), A. C. 57.

⁶ *Nicholas v. Com.* (Va.), 21 S. E. 864.

they have some connection with each other, as a part of the same plan or induced by the same motive. Precedent acts which render the commission of the crime charged more easy, more safe, more certain, more effective to produce the ultimate result which formed the general motive and inducement, if done with that intention and purpose, have such a connection with the crime charged as to be admissible, though they are also of themselves criminal.¹ For example, adulterous intercourse may be proved as a circumstance leading to the commission of a crime.² And evidence of familiarities on former occasions is admissible to corroborate other evidence tending to show a commission of the act of adultery at a particular time.³ But testimony of adulterous conduct of defendant subsequently to the commission of incest for which he is being tried cannot be considered as having a bearing upon the question of his guilt of the crime charged.⁴ Though acts prior and also subsequent to the act charged in the indictment, when indicating a continuousness of illicit intercourse, are admissible in evidence as showing the relation and mutual disposition of the parties. The reception of such evidence must be largely controlled by the judge who tries the case, and the evidence should be submitted to the jury with proper explanation of its purpose and effect.⁵

Where the prisoner was indicted for the murder of one F., her brother-in-law, by poisoning, to prove a motive for the crime it was shown that F. was insured in favor of his wife, and that, on the decease of the latter, a short time before F.'s death, he named the defendant beneficiary in place of his wife. It was noted that if evidence should be introduced tending to show that the defendant knew, before her sister's death, of the existence of the insurance, and that it could be transferred on the death of her sister to herself, and made payable to herself on the death of her brother-in-law; and

¹ See opinion in *Com. v. Robinson*, 6 N. Eng. 217.

² *Com. v. Terrigan*, 8 Wright, 386; *Turner v. Com.*, 86 Pa. 54; *State v. Watkins*, 9 Conn. 47.

³ *State v. Wallace*, 9 N. H. 515; *Com. v. Merriam*, 14 Pick. 518; *State v. Clawson*, 32 Mo. App. 93; *Com. v. Bell* (Pa.), 36 W. N. C. 146; 31 Atl. 123; *People v. Patterson* (Cal.), 36 Pac. 436.

⁴ See *Porath v. State* (Wis.), 63 N. W. 1061; *People v. Fowler* (Mich.), 62 N. W. 572.

⁵ *State v. Witham*, 72 Me. 531.

that she, before her sister's death, had formed in her own mind a plan or intention to obtain this insurance for her own benefit, and this plan or intention continued to exist and be operative up to the time of the death of her brother-in-law, then evidence might be offered that her sister died of poison, and that the defendant administered it as a part of the method employed by her to carry this plan or intention into effect, in connection with evidence that she administered poison to her brother-in-law as another part of the same plan or intention.¹

On trial of an indictment for obtaining money under false pretences, letters written by one defendant to another, some concerning the transaction in question, were put in evidence to show that the defendants were carrying on a general swindling business, and to show the entire history of the fraud.² A single act or representation would not, in many cases, be decisive, especially where the accused has sustained a previously good character. But where it is shown that he made similar representations about the same time to other persons, and by means of such representations, all of which were false, obtained goods, the presumption is greatly strengthened that he intended to defraud.³ And where a conspiracy to defraud is alleged, other fraudulent purchases than these set out in the indictment, made about the same time and in pursuance of the conspiracy, are admissible for the purpose of showing the intent with which the goods were purchased.⁴

Still greater caution has been observed in framing the rule in Pennsylvania, where it has been said that to make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish; or it must be necessary to identify the person of the actor, by a connection which shows that he who committed the one must have done the other.⁵

Where an act is shown to have been done by a party entrusted with money, and the inquiry is whether it was an act

¹ *Com. v. Robinson*, *supra*.

² *Com. v. Blood*, 2 N. Eng. 393. See *Com. v. Choate*, 105 Mass. 451; *Com. v. Scott*, 123 Mass. 222.

³ *Trogon v. Com.*, 31 Grat. 862.

⁴ *Rex v. Roberts*, 1 Camp. 899; *Com. v. Eastman*, 1 Cush. 189; *Bottomley v. U. S.*, 1 Story, 185.

⁵ *Shaffner v. Com.*, 72 Pa. St. 60.

of embezzlement, other similar acts in the conduct of the same business are admissible as showing his criminal intent.¹

On the principle of these cases, it has been provided by statute in England, that the prosecutor may give evidence of any number of distinct acts of embezzlement, not exceeding three, committed against the same master,² or of larceny committed against the same person³ respectively within six calendar months from the first to the last of such acts; and by St. 2 Wm. IV. c. 34, § 7, any person uttering counterfeit coin, and having in his possession at the same time one or more pieces of counterfeit coin, or who either on the day of such uttering, or within ten days, shall utter other counterfeit coin, is made guilty of a much more aggravated offence than that of simply uttering base coin.

Where, in a recent case, there were three charges of embezzlement in one indictment, it was held that the jury were properly told that they might lawfully consider the conduct of the prisoner in relation to the matter referred to in all the counts when considering any one of them, in order to determine whether the prisoner had failed to pay over the money accidentally or fraudulently.⁴

And where, upon the trial of a man for setting fire to a stack of straw, it appeared that it had been set on fire by his having fired a gun very near to it, evidence was admitted that the stack had been set fire to the day before, and that the prisoner was very near to it with his gun at the same time;⁵ and in a similar case, Mr. Justice Patterson admitted evidence of the prisoner's presence and demeanor at incendiary fires of other ricks, the property respectively of two other persons, which occurred the same night, although those fires were the subjects of other indictments against the prisoner; but the learned judge held that evidence could not be given of threats, statements, and particular acts pointing alone to such other charges, and not tending to explain the conduct of the prisoner in reference to the fire in question.⁶ So in a later case where the prisoner was accused of arson and the question became one of

¹ *Rex v. Ellis*, 6 B. & C. 145; *Reg. v. Richardson*, 2 F. & F. 343; *Com. v. Tuckeman*, 10 Gray, 173; *Com. v. Shepard*, 1 Allen, 575.

² 7 & 8 Geo. IV. c. 29, § 48.

³ 14 & 15 Vict. c. 100, § 18.

⁴ *Reg. v. Stephens*, 16 Cox C. C. 387.

⁵ *Reg. v. Dossett*, 2 C. & K. 306, coram MAULE, J.

⁶ *Reg. v. Taylor*, 5 Cox C. C. 138.

identity, evidence was rejected to show that a few days before another building of the prosecutor's was on fire and the prisoner was seen standing by, evincing signs of gratification, and interfered with another who would have put the fire out.¹ In delivering the opinion in this case, Willes, J., took occasion to affirm the principle laid down above, citing the cases mentioned in the notes.

On a trial for arson with intent to defraud insurance companies, evidence was admitted that the prisoner had made claims in insurance companies with respect to two other fires which had occurred in houses successively occupied by him. The nature of the fires was not proved, nor their cause; nor was there any proof that the prisoner was in or near either of the houses, or that he was in England at the time when the fires occurred.²

A defendant was convicted of the crime of arson, and it was shown on the trial that the watch-dog had died from eating meat with strychnine on it, and that the defendant having been arrested for stealing a chicken from a barn where he had slept that night, there were found in his possession two pieces of meat poisoned by strychnine and tied with twine similar to twine found in the stomach of the dog and to that around pieces of meat found in the yard on the morning after the fire. This testimony was all objected to, but the Supreme Court affirmed the judgment. In the course of the opinion it was said: "If the only object was to prove that the defendant committed these crimes [larceny of the chicken and poisoning of the dog], the evidence would have been improper, except to show a motive for the commission of the crime charged. It was proper to show that the defendant poisoned the watch-dog, as this might imply malice towards the owner, and furnish a motive for the arson. Or the dog might have been killed to prevent an alarm before the consummation of the crime or detection afterwards. The killing of the dog by poisoned meat, and proof that similar packages of poisoned meat were found on the person of the accused, afforded important evidence of his identity with the person who killed the dog, and that he was present on the premises that night and about the time the fire was set. These were facts and circumstances bearing directly on the crime charged, and the proof of

¹ Reg. v. Harris, 4 F. & F. 342.

² Reg. v. Gray, 4 F. & F. 1102.

another crime was only incidental to this main purpose. If the examination of any case of crime must be suspended, lest the evidence might show the accused to have been guilty of other offences, while at the same time it is relevant and necessary to prove the crime charged, then the person guilty of the greatest number of crimes may often hold them before him as a shield and protection against the full disclosure of such facts and circumstances as may convict him of the crime charged."¹

Mr. Justice Erle said his experience had taught him that in cases of arson indications of guilt were often found in extremely minute circumstances, which were not the less cogent on that account; that it was to the words, whether true or false, by which a man accounted for himself at the critical time, to his conduct when the fire was in progress, to his manner of offering assistance, and other such particulars, that attention should be directed, and that in the absence of broad facts, such minute circumstances often afforded satisfactory evidence.²

Where the defendant was indicted for the crime of lewdness, by wilfully exposing his person in a public place, and evidence of acts of a similar character committed by the defendant at the same place, on the same day, and also on the preceding day, in the presence of parties other than the prosecuting witness, was admissible. And it was held likewise proper to show that, in connection with one of these acts, the defendant had made an indecent proposal to a young lady.³

In another case the defendants were indicted and convicted for stealing one mare, the property of N. On the trial the prosecution gave evidence tending to show that the animal described was stolen from N.'s pasture on the night of the 12th of October; and that on the same night another animal was stolen from one A., and a saddle and bridle from B. On the 15th the defendants were seen at a toll-gate with these two animals in their possession, but having no money to pay toll, were compelled to turn back. Two days later the animals were turned into a pasture near the toll-road, where they remained until the night of the 30th, when they were taken

¹ State v. Halleck, 65 Wis. 147 ; 7 Crim. L. Mag. 648.

² Charge to the Grand Jury : Warwick Spring Ass., 1859.

³ State v. Stice, 88 Ia. 27.

out without the knowledge of the owner of the pasture, and without the pasturage having been paid. On the same night that the animals were taken from the pasture, and on the direct route to the town of S., there was stolen from R. a hack, a set of harness, and a robe, and from C. a pair of single lines, a buggy cushion, and two blankets. On the evening of the following day the defendants were arrested at S., when they had in their possession both of the stolen horses and the property stolen from A., B., R., and C. Here the evidence tending to show that the property found in the defendants' possession at the time of their arrest was stolen property, was so intermingled and connected with the evidence tending to show that defendants committed the crime charged, as to form one entire transaction, and to identify the actor by a connection which legally tended to show that he who committed the one must have committed the other. To exclude the evidence relating to the larcenies for which the prisoners were not on trial, would have broken the chain, formed of links more or less perfect, connecting them with the one which constituted the subject-matter of the trial, for it was impracticable for the prosecution to trace the animal of N., and the defendants' connection therewith from the time it was stolen till their arrest, without disclosing the commission of the other crimes.¹

Instances of killing to conceal other crimes are frequent, and evidence of the murder of one person may be given in evidence upon a trial for the murder of another, if such evidence tend to show that the prisoner might have had a motive arising out of the other murder for committing that with which he is charged.²

Where the prisoner was indicted for the murder of her child by arsenical poisoning, it appeared that she had several times complained of the cost of the child's support, and that she had its life insured. An analytical chemist testified that he had found in the stomach of the deceased more than sufficient arsenic to produce death. The principal point in the case was the admission of testimony of the same witness to the effect that he had examined the bodies of two other children of the deceased and another person who had lived in the house—the

¹ *State v. Baker*, 23 Ore. 441. See opinion of LORD, C. J.

² *Com. v. Ferrigan*, 8 Wright, 886; *Rex v. Clewes*, 4 C. & P. 221. And see *Reg. v. Geering*, *infra*.

bodies having been exhumed for the purpose—and that he had found arsenic in each. The prisoner was found guilty.¹

This case was followed by one where the prisoner was indicted for the murder of her child by suffocation. It was allowed to be proved that several other children of the prisoner had died at early ages, Lush, J., saying that the value of the evidence did not affect its admissibility. But a physician having testified that death might have occurred by the mother accidentally overlying the child, or by the clothes covering it, an acquittal was directed.²

Evidence has frequently been held admissible of other transactions where previous attempts have been made unsuccessfully to commit the same crime. On an indictment for maliciously burning a building, evidence was admitted tending to prove that the defendant set fire to the same building a few nights before, and that the fire was then discovered and extinguished by a neighbor.³ And on the question of intent, the government was permitted to show that the defendant, a few nights before, set fire to a shed ten feet distant from the building burned, and connected therewith by a flight of steps.⁴

The prisoner in one case was on trial for an assault with intent to murder, alleged to have been committed in March, 1891. In the summer of 1891 he had been convicted of a similar assault upon the same party which had occurred in December, 1890. To show motive and ill-will, the prosecution was permitted to prove the prior assault and conviction.⁵

On the trial of one for procuring a miscarriage by the use of a quill, evidence was admitted to prove other similar acts by the prisoner by the use of a similar instrument both before and after the act in question to show intent.⁶

On an indictment for burning property with intent to defraud the insurance company, evidence was admitted of a previous conspiracy to burn the same property.⁷

On a trial for murder, evidence that two or three weeks prior to the killing the deceased had been waylaid and shot at, and

¹ Reg. v. Cotton, 12 Cox C. C. 400.

² Reg. v. Roden, 12 Cox C. C. 680. By these cases, Reg. v. Winslow, 8 Cox C. C. 397, was virtually overruled.

³ Com. v. Bradford, 126 Mass. 42.

⁴ In Com. v. McCarthy, 119 Mass. 354. And see Martin v. State, 28 Ala. 71.

⁵ Crass v. State, 80 Tex. App. 480.

⁶ Reg. v. Dale, 16 Cox C. C. 708.

⁷ Meister v. People, 81 Mich. 99.

that the defendant had said that he did it, was held admissible, as strongly tending to identify the guilty party, and as showing the *animus* of the accused towards the deceased.¹ And in another case the State introduced evidence showing that defendant attempted to cut the deceased with a knife, the night before the murder, and a witness was allowed to testify to having seen a cut in deceased's dress.² And on a trial for assault by shooting, to show malice, it was permitted to be proved that just previous to the shooting the accused had made an assault upon the same person with a knife, it being part of a continuous act.³

And again upon a charge of maliciously shooting, where the question was whether the act proceeded from an accident or design, evidence was admitted that the prisoner had intentionally shot at the same person about a quarter of an hour before.⁴ On a trial for murder by administering prussic acid in porter, Mr. Baron Parke admitted evidence that the deceased had been taken ill several months before, after partaking of porter with the prisoner, and said that although this was no direct proof of an attempt to poison, the evidence was nevertheless admissible, because anything tending to show antipathy in the party accused against the deceased was admissible.⁵

On an indictment for murder, an indictment against the defendant for assault with intent to murder the same person about two years before the killing, which indictment was still pending, was admitted to show motive.⁶ A recent case was an indictment for assault with intent to commit sodomy. The assault was committed on board a train moving from Oregon into Washington. If the evidence had been confined to what happened in the county in which the venue was laid, it would have been difficult to make out the case, for the facts in evidence would have left it doubtful what the appellant was trying to do. But the prosecution was allowed to show the particulars of a former assault made on the same person while the train was yet in Oregon, where the intent was very clear, to assist the jury to come to a conclusion as to the defendant's real intention in making the second assault.⁷

¹ *Washington v. State*, 8 Tex. App. 377. ² *State v. Lewis*, 80 Mo. 110.

³ *State v. Porter*, 45 La. Ann. And see *State v. Patza*, 8 La. Ann. 518.

⁴ *Rex v. Coke*, R. & R. 653.

⁵ *Rex v. Tawell*, *infra*.

⁶ *Hart v. State*, 15 Tex. App. 202. ⁷ *State v. Place* (Wash.), 32 Pac. 736.

The rule is recognized as well established that in cases where guilty knowledge is an ingredient of the offence charged, the same may be proved, as other facts are proved, by circumstantial evidence, and that other acts of a like character, although involving substantial crimes, may be given in evidence to prove the *scienter*. The principal limitation of the rule is, that the criminal act which is sought to be given in evidence, must be necessarily connected with that which is the subject of the prosecution, either from some connection of time and place, or as furnishing a clue to the motive on the part of the accused.¹

On the trial of an indictment for the theft of a horse where the defendant, when arrested, had been found in possession of articles stolen by his companion a few days before, evidence of this fact was admitted, as well as of the circumstances of the previous thefts, as manifesting that the two were engaged jointly in a series of thefts, which included the one for which the defendant was on trial, and as tending to establish guilty knowledge and participancy in the theft charged.²

So on a trial for attempting to obtain money from a pawnbroker on a worthless ring, by representing it to be a diamond ring, evidence was admitted to show guilty knowledge that a few days before the defendant had obtained money from another pawnbroker on a worthless chain which he had represented to be a gold chain. Such testimony was not conclusive, but it tended to show that he had been pursuing a similar course, and raised the presumption that he was not acting under a mistake, and that he was not the dupe of any one.³ And on a charge of sending an obscene letter through the mails, it being necessary to prove guilty knowledge, another letter received by the same person and the address upon the envelope thereof were held admissible.⁴

In a case to which reference has been heretofore made,⁵ Lord Chief Justice Campbell said that the rule which had "prevailed in the case of indictment for uttering forged notes, of allowing evidence to be given of the uttering of other forged notes to different persons, had gone great lengths, and he would be un-

¹ *Coleman v. People*, 58 N. Y. 555.

² *Hardin v. State*, 8 Tex. App. 658.

³ *Reg. v. Francis*, 12 Cox C. C. 612. And see *Reg. v. Roebuck*, 25 L. J. M. C. 51.

⁴ *Thomas v. State*, 103 Ind. 419.

⁵ *Reg. v. Butler*, 2 C. & K. 221.

willing to see the rule applied generally in the administration of the criminal law." A base coin or counterfeit bill is often passed innocently. It is important therefore to show a guilty knowledge of their character on the part of the person uttering them in order to lay the foundation of a just inference of crime against him. His knowledge of the thing uttered is shown by his familiarity with it, as shown by his use of it, or similar instruments, on former occasions. Therefore the admissibility of evidence, in a trial for uttering counterfeit bills or base coin, of the utterance of similar bills or coin to other persons about the same time, is well established in England and America.¹ Upon a charge of uttering forged notes, the forged notes, either of the same or of a different bank, found on the prisoner's person, were allowed to be given in evidence to show guilty knowledge;² and upon an indictment for uttering a forged Bank of England note, evidence was admitted that other notes of the same fabrication had been found on the files of the Bank, with the prisoner's handwriting on the back of them.³

On the question of the defendant's knowledge that the bills in issue were not genuine, his possession and use of other similar false bills, about the same time, whether before or afterwards, in a continuous series of transactions, with the same persons, under the same contract, was competent to show that his use of the former was not innocent.⁴ Evidence of the subsequent uttering of another forged note has been held inadmissible to prove guilty knowledge, unless the latter uttering is in some way connected with the uttering which is the subject of indictment, as by showing that all of the notes are of the same manufacture.⁵ To make such circumstance evidence, it has been said, there must be a strong connection on the subject-matter. And on a trial for passing counterfeit coin, it may not be shown that the prisoner had in his possession an engraved print in imitation of a bank-note.⁶ "No doubt," says Roscoe, "there would be some limits both as to time and circumstances

¹ *Com. v. Stine*, 4 Met. 48; *Com. v. Bigelow*, 8 Met. 285.

² *Rex v. Sunderland*, 1 Lewin, 102; *Rex v. Hodgson*, Id. 103; *Rex v. Kirkwood*, Id. 103; *Rex v. Martin*, Id. 104; *Rex v. Hall*; *Rex v. Millward*, R. & R. 245; *Reg. v. Green*, 3 C. & K. 209.

³ *Rex v. Ball*, 1 Campbell, 324; R. & R. 132.

⁴ *Com. v. White*, 145 Mass. 392; *Devere v. State*, 5 Ohio C. C. 509.

⁵ *Rex v. Taverner*, 6 C. & P. 418. And see *Reg. v. Smith*, Id.

⁶ *Stalker v. State*, 9 Conn. 841.

beyond which evidence of uttering forged instruments on other occasions would not be permitted.”¹ And it has been held that if the passing of the other note be at a remote period, it is not sufficient.²

The possession of a large quantity of counterfeit coin, many of each sort being of the same mould, and each piece of it being wrapped in a separate piece of paper, and the whole distributed in different pockets of the dress, was held to be evidence that the prisoner knew that the coin was counterfeit, and intended to utter it.³ And it has been held that where other coins of the same denomination as those on which the prosecution is based are found in the prisoner's possession, they need not be produced in court.⁴ The principle was carried rather far on an indictment for uttering a counterfeit crown-piece, knowing it to be counterfeit, where evidence was admitted, in order to prove the guilty knowledge, that the prisoner on a day subsequent to such uttering uttered a counterfeit shilling.⁵ “The uttering of a piece of bad silver,” said the court, “although of a different denomination from that alleged in the indictment, is so connected with the offence charged, that the evidence of it was receivable.”

The guilty knowledge, which is an essential of the crime of receiving stolen goods, knowing them to have been stolen, is rarely the subject of direct proof;⁶ and evidence that other goods, known to have been stolen, were previously received by defendant from the same thief, is admissible for the purpose of showing guilty knowledge.⁷ The circumstance of itself may be of little value, for it does not necessarily follow that the goods mentioned in the indictment were stolen because the others were, but where taken in connection with other circumstances, such as that the goods mentioned in the indictment were sold under value, received at night, or concealed, it might strongly tend to fasten guilt upon the defendant.

¹ Cr. Ev. (8th Am. Ed.) 146.

² Dougherty's Case, 3 City Hall Rec. 148.

³ Reg. v. Jarvis, 25 L. J. M. C. 80; Rex v. Fuller, R. & R. 308.

⁴ McGregor v. State, 16 Ind. 9.

⁵ Reg. v. Foster, 6 Cox C. C. 521; 24 L. J. M. C. 134. See *State v. Houston*, 1 Bail. 800; *Martin v. Com.*, 5 Leigh, 707.

⁶ *Adams v. State*, 52 Ala. 379.

⁷ *Shriedley v. State*, 23 Ohio St. 130; *State v. Ward*, 49 Conn. 529; *Devoto v. Com.*, 3 Met. (Ky.) 417.

Where, upon an indictment for receiving goods knowing them to have been stolen, it appeared that the articles had been stolen, and had come into the possession of the prisoner at several distinct times, the judge, after compelling the prosecutor to elect upon which act of receiving he would proceed, told the jury that they might take into their consideration the circumstances of the prisoner having the various articles of stolen property in his possession, and pledging or otherwise disposing of them at various times, as an ingredient in coming to a determination whether, when he received the articles for which the prosecutor elected to proceed, he knew them to have been stolen.¹ In like manner, upon an indictment against principal and receiver, where goods were found upon the receiver's premises, which had been taken from the prosecutor's premises, it was held that the prosecutor might give evidence of the finding of other goods at the house of the principal, notwithstanding there was no evidence to connect the receiver with them, and that he was not bound to elect.² But in order that the possession of other goods may be proved for the purpose of showing guilty knowledge as allowed by St. 34 & 35 Vict. c. 112, § 19, the possession of such property must be shown to have existed at the time when the prisoner was found in possession of the property mentioned in the indictment.³

¹ *Rex v. Dunn*, 1 Moo. C. C. 150. And see *Reg. v. Bleasdale*, 2 C. & K. 765.

² *Reg. v. Hinley*, 1 Cox C. C. 12.

³ *Reg. v. Drage*, 14 Cox C. C. 85; *Reg. v. Carter*, 15 Cox C. C. 448.

CHAPTER III.

PREPARATION AND OPPORTUNITY FOR THE COMMISSION OF CRIME.

PREMEDITATED crime must necessarily be preceded, not only by impelling motives, but by appropriate preparations. Possession of the instruments or means of crime, under circumstances of suspicion, as of poison, coining instruments, combustible matters, picklocks, housebreaking instruments, dark-lanterns, or other destructive or criminal or suspicious weapons, materials, or instruments, and many other acts of apparent preparation, are important facts in the judicial investigation of imputed crime. The possession of a quantity of counterfeit coin upon the person or the premises of the party implicated warrants the inference that he made it. And this inference is greatly strengthened by proof that instruments or tools designed for the manufacture of such coin were found in the possession of the accused person. But this presumption of guilt may be negatived by evidence showing that the false coin, though manufactured by him, was made for an innocent purpose, or a purpose not rendering the act criminal.¹

Where a man had in his possession a large quantity of counterfeit coin unaccounted for, and there was no evidence that he was the maker, it was held to raise a presumption of an intention to utter it.²

Where it is shown that wounds on the person of deceased could have been made with certain instruments, it may be shown that defendant had in his possession, shortly before the homicide, such instruments.³ And it may be shown that a few days before the murder the defendant purchased, at a store in

¹ *United States v. King*, 5 McLean, 208.

² *Rex v. Fuller*, R. & R. 308; *People v. Pomeroy*, 2 Wheel. Crim. Rep. 159; *People v. Haggerty*, Id. 195; *People v. Gardner*, Id. 23; *Galbrant's Case*, 1 City Hall Rec. 109.

³ *State v. Rainsbarger*, 74 Ia. 196, 539.

the neighborhood, shot corresponding in size with that found in the body of the deceased.¹

Burglarious tools found in the possession of defendant after the commission of a burglary may be offered in evidence when they constitute a link in the chain of circumstances which tend to connect the defendant with the commission of the particular burglary charged.² But before such tools can be received in evidence, it must be shown that the burglary charged was in fact committed, and that it was committed with the aid of tools like those proposed to be shown, and that the defendant was in the vicinity at or about the time when the offence was committed. And where the defendant was accused of robbing a stage on the morning of August 11, and it was shown that on the afternoon of that day he was thirty miles from the scene of the robbery, and the offence was not committed by the aid of articles like those proposed to be shown, it was held improper to admit burglarious tools found in defendant's possession forty-one days after the offence.³ But in a case in Missouri, where a burglary had been committed without the aid of burglarious instruments, and immediately thereafter a person was arrested going from the scene of the crime under circumstances tending to connect him with the commission of the act, and he had in his possession burglarious implements, it was held, that such possession might be shown as a circumstance tending to prove, when taken in connection with the other suspicious circumstances, that he committed the offence.⁴

Where the defendant was indicted jointly with another for burglary, evidence that burglarious tools were made for the latter was admitted to connect the prisoner with the crime.⁵ But the mere fact that burglar's tools were found in the possession of the accused when he was arrested, though taken in connection with the fact that at the time of the offence he occupied a room in the same hotel with the one which was entered, and not fifteen feet away from it, was held insufficient to connect accused with the particular offence charged. And the suspicion of guilt was weakened by the fact that an immediate search was made in the prisoner's room, and none of the

¹ Howard v. State, 8 Tex. App. 53.

² People v. Winters, 29 Cal. 652.

³ People v. Sansome, 84 Cal. 449.

⁴ State v. Davis, 80 Mo. 53.

⁵ People v. Clark, 2 Hun, 520.

money stolen was found, though part of it, a twenty-dollar note, could have been easily identified.¹

Unless the party possesses the *opportunity* of committing the imputed act, neither the existence of motives nor the manifestation of criminal intention by threats or otherwise, followed even by preparations for its commission, can be of any weight.

On a trial for the murder of one of two men towards whom the defendant had expressed strong ill-feeling, the prosecution was permitted to show that the two were separated, and one of them lodged in jail on a trumped-up accusation made by the defendant, and a few hours before the other was murdered, while on his return home from accompanying the former to jail, to show motive, preparation, and opportunity.² Where a girl had been outraged and murdered on her way home from school, and the defendant was indicted for the crime, evidence was admitted to show that he was, on the day of the murder, at a place where he could know when the child left the school, and that his being in that place was an unusual occurrence with him.³

Where three were indicted for murder, the prosecution was permitted to show the existence of a secret organization whose object was crime and the concealment of the criminal, etc., and that the defendants were members of such organization, to explain the relations existing between the conspirators, the reason, motive, and opportunity for their combined action, and the nature of the tie that bound them together.⁴

But the personal character for probity, and the civil station of the party, are highly material in connection with facts such as we have been considering. A medical man, for instance, in the ordinary course of his profession, has legitimate occasion for the possession of poisons, a locksmith for the use of pick-locks. In many cases the possession of such materials or instruments, and other acts indicative of purpose to commit crime, are made by statute *prima facie* presumptions of guilt, and in some even substantive offences.⁵

Facts of the kind referred to become more powerful indications of guilty purpose if false reasons are assigned to account

¹ Johnson v. Com., 29 Grat. 796.

² Hubby v. State, 8 Tex. App. 597.

³ Campbell v. State, 28 Ala. 44.

⁴ Hester v. Com., 85 Pa. 189.

⁵ See *infra*.

for them ; as in the case of possessing poison, that it was procured to destroy vermin, which is the excuse commonly resorted to in such cases.

The bare possession of the means of crime, or other mere acts of preparation, without more conclusive evidence, are not in general of great weight,¹ because the intended guilt may not have been consummated ; and until that takes place there is the *locus penitentiae*. But as preparations must necessarily precede the commission of premeditated crime, some traces of them may generally be expected to be discovered ; and if there be not clear and decisive proof of guilt, the absence of any evidence of such preliminary measures is a circumstance strongly presumptive of innocence.

¹ *State v. Rainsbarger, supra.*

CHAPTER IV.

RECENT POSSESSION OF THE FRUITS OF CRIME.

SECTION I.

General Statement of the Law on this Subject.

SINCE the desire of dishonest gain is the impelling motive to theft and robbery, it naturally follows that the possession of the fruits of crime recently after it has been committed affords a strong and reasonable ground for the presumption that the party in whose possession they are found was the real offender, unless he can account for such possession in some way consistently with his innocence.¹ Larceny is a crime committed in secret, and the State is, in most cases, necessarily compelled to resort to circumstantial evidence to effect a conviction of the thief. And the possession of the property shortly after the theft is the circumstance most usually relied upon. Such possession is not positive proof and does not relieve the case of its circumstantial character.²

Before the presumption arising from possession will attach to the accused, the *corpus delicti* must be made out.³ The mere possession of goods which have been actually lost does not furnish any conclusive or *prima facie* proof of guilt of larceny; of itself it does not raise the suspicion of guilt.⁴ In the case last cited the proof did not show that the property found in the defendant's possession had been stolen at all, and the witness

¹ *Rex v. Burdett*, 4 B. & Ald. 149; *Burnett on the C. L. of Scotland*, 555; ² *Mascardus De Prob. ut supra*, Concl. DCCCXXXIV; ³ *Hume's Comm. on the C. L. of Scotland*, 111; *Best on Pres.* 44; *Tucker v. State*, 57 Ga. 503.

⁴ *Faulkner v. State*, 15 Tex. Crim. App. 115.

⁵ *Carey v. State*, 7 Humph. 499.

⁶ *Hunt v. Com.*, 18 Grat. 757; *State v. Furlong*, 19 Me. 225.

who was alleged to be its owner could not identify it so as to distinguish it from the same kind of property sold to his customer residing in the same vicinity as the prisoner.

The force of this presumption has been recognized from the earliest times; and it is founded on the obvious consideration, that if such possession have been lawfully acquired, the party would be able, at least shortly after its acquisition, to give an account of the manner in which it was obtained; and his unwillingness or inability to afford such explanation is justly regarded as amounting to strong self-condemnatory evidence.

It is not so much the mere possession of the stolen goods as it is the nature of the possession; whether it is an open and unconcealed one, or whether the goods are such as the person found in possession thereof would probably be possessed of in a lawful way. If property of great value should be found in the possession of one known to be poor, so as to render it highly improbable that he had purchased it, an inference of guilt would arise much stronger than if such property were found in the possession of a man of wealth, who would probably purchase goods of such value.¹

There is some conflict in the authorities as to the effect to be given to the proof of possession of stolen property.

The presumption arising from possession has been said to be one of law.² This proposition, though laid down by a court of recognized ability, is at variance with the great weight of authority. For the presumption is generally declared to be one of fact, and it is said that under no circumstances does it become a conclusive presumption of law.³ It is not a presumption or conclusion of law, but a deduction of fact to be drawn and ascertained by the jury alone from the circumstances of

¹ *Ingalls v. State*, 48 Wis. 647. And see *Perry v. State*, 41 Tex. 483.

² *State v. Kelly*, 73 Mo. 608. The attention of the reader is directed to *State v. Kelly*, 9 Mo. App. 512, where LEWIS, P. J., said: "There are sufficient defences against the presumption arising from possession which do not explain the possession; *e. g.*, *alibi*, pure character. Therefore it cannot be under any circumstances whatever a conclusive presumption of law."

³ *Stokes v. State*, 58 Miss. 677. This case disapproved the decision in *Belote's Case*, 36 Miss. 97, where, though the presumption was spoken of as one of fact, an instruction was approved which said to the jury, that "if you believe the possession unexplained you will find the accused guilty." And see *Snowden v. State*, 62 Miss. 100; *Smith v. State*, 58 Ind. 841.

the case.¹ "It is a presumption," said Bailey, J., "established by no legal rule, ascertained by no legal test, defined by no legal terms, measured by no legal standard, bounded by no legal limits. It has none of the characteristics of law. Whether it be found by the judge or the jury, the judge and the jury must be equally unconscious of finding in it any semblance of a legal principle, however much good sense may appear in the result arrived at."² And it is not a presumption of law and fact combined.³

Some authorities hold that possession alone is not sufficient in any case to warrant a conviction. The rule in California is stated as being that possession, together with proof of other circumstances indicative of guilt, would make a *prima facie* case against defendant.⁴

And the circumstances indicative of guilt which must be shown in order to render the naked possession of the thing available toward a conviction, must be such as are naturally calculated to awaken suspicion against the party charged and to corroborate the influence of guilty possession.⁵

In Texas the possession of the stolen property recently after the theft, united with the failure of the one in whose possession it is found to satisfactorily account for the possession, when called upon to explain, will, though unaccompanied by any other evidence, warrant a conviction.⁶ Recent possession alone

¹ Lockhart v. State, 29 Tex. Crim. App. 35; Ayres v. State, 21 Tex. Crim. App. 399; Dillon v. People, 1 Hun, 670.

² State v. Hodge, 50 N. H. 510. The learned judge in this case said further: "The law is burdened and obscured by a great mass of common opinion, general understanding, practice, precedent, and authority (including the presumption from the possession of stolen property) that has passed for law, but is in truth not law, but fact, coming down to us largely by descent from the ancient custom of the judge giving the jury his opinion of the evidence." See also State v. Hale, 12 Ore. 352.

³ Graves v. State, 12 Wis. 591. Practically, said the court, in State v. Richart, 57 Ia. 245, it is immaterial what the presumption is called, unless, by reason thereof, the jury are directed to convict. Until this is done it remains a presumption of fact. See also State v. Kelly, 57 Ia. 644.

⁴ People v. Antonio, 27 Cal. 404. See also People v. Ah Ki, 20 Cal. 177; People v. Gassaway, 23 Cal. 51; Durant v. People, 18 Mich. 351.

⁵ People v. Chambers, 18 Cal. 382.

⁶ Lehman v. State, 18 Tex. Crim. App. 174; McNair v. State, 14 Id. 83; Roberts v. State, 17 Id. 82, overruling on this point Hannah v. State, 1 Tex. Crim. App. 582. And see State v. Kelly, 57 Ia. 644; State v. Creson, 38 Mo. 372; State v. Ingram, 16 Kan. 14; Knickerbocker v. People, 43 N. Y. 177;

is a circumstance to be considered by the jury,¹ but, without an opportunity to explain, it does not warrant a conviction.²

Where one accused of the theft of cattle was convicted on evidence that the hide of a cow was found in his house at the time of his arrest, and he was not informed of the cause of the arrest, nor his attention called to the fact that the hide was found in the house, and that he was suspected of the theft, the conviction was reversed.³ Again, on the trial of an indictment for theft, the judge charged that the "possession of property recently stolen is evidence against the accused which, like all other evidence, is to be taken and considered by the jury in connection with other testimony in the case." This, on review by the Court of Appeals, was held to be erroneous, and the true rule was said to be that "the possession of property recently stolen is merely a fact or circumstance⁴ to be considered by the jury, in connection with all the other evidence submitted to them, in determining the guilt of the possessor." It is not always that the possession of recently stolen property is evidence against the possessor. It is always admissible evidence in a trial for theft, but it is for the jury, and not the judge, to determine whether it is against the defendant;⁵ or whether it is strong, or only slight, evidence tending to show guilt.

And in West Virginia possession of stolen goods is not *prima facie* evidence that the possessor is the thief, even when unaccompanied by a reasonable explanation of how the possession was acquired; but still evidence of such possession is proper to be considered by the jury in connection with the other evidence.⁷

In Illinois it is settled that recent possession is *prima facie*

State v. Jenkins, 2 Tyler (Vt.), 377; *State v. Arnold*, 12 Ia. 479; *State v. Daley*, 37 La. Ann. 576; *People v. Wilson*, 30 Mich. 486.

¹ *Montgomery v. State*, 18 Tex. Crim. App. 669; *Truax v. State*, 12 Tex. Crim. App. 230.

² *Moreno v. State*, 24 Tex. Crim. App. 401. And see *People v. Elster*, 5 Crim. L. Mag. 687; *State v. En*, 10 Mo. 277.

³ *Moreno v. State*, *supra*.

⁴ It is at most but a circumstance weaker or stronger as the case may be. *Schultz v. State*, 20 Tex. Crim. App. 308; *Sullivan v. State*, 18 Tex. Crim. App. 623.

⁵ *Bryant v. State*, 16 Tex. Crim. App. 144. See also *Cooper v. State*, 29 Tex. Crim. App. 8.

⁶ *People v. Witherington*, 59 Cal. 598; *People v. Ah Sing*, 59 Cal. 400.

⁷ *State v. Reese*, 27 W. Va. 375.

evidence of guilt, and is sufficient to warrant a conviction unless the attending circumstances or other evidence so far overcome the presumption as to create a reasonable doubt of guilt.¹

In Missouri recent possession is *prima facie* evidence of guilt,² and in the absence of rebutting evidence is conclusive.³ But it is worthy of note that Judge Henry has, in several cases, delivered earnest opinions in which he has refused to give his adhesion to the rule declared by the majority of the court, and in which he has insisted that the weight of authority supports the proposition, that the recent possession is nothing but circumstantial evidence of guilt,⁴ and affords no presumption which authorizes the court to declare to the jury that the defendant stole the property.⁵

The better rule probably is that if the possession be recent after the theft, such evidence is sufficient to make out a *prima facie* case proper to be left to the jury.⁶ Where the defendant was accused of the larceny of certain sheep, the court said it was too strong to instruct the jury that they must convict the accused, unless he had proved, to their reasonable satisfaction, that he came by the sheep otherwise than by stealing.

It is always a question for the jury, applying to the solution of the problem the common experiences and observations of life, whether they are satisfied, from all attending circumstances and other facts in evidence, that the possession was honest or felonious.⁷

Possession of property recently stolen without reasonable explanation of that possession is evidence of guilt to go to

¹ *Smith v. People*, 103 Ill. 82; *Sahlinger v. People*, 102 Ill. 241; *Comfort v. People*, 54 Ill. 404. *Cronkwright v. People*, 35 Ill. 204, seems to hold that possession of itself is not *prima facie* evidence, but in *Comfort v. People*, *supra*, that ruling is disavowed.

² *State v. Beatty*, 90 Mo. 142; *State v. Butterfield*, 75 Mo. 297; *State v. Bulla*, 89 Mo. 595; *State v. Brown*, 75 Mo. 317.

³ *State v. Jennings*, 81 Mo. 185. In *State v. Kennedy*, 88 Mo. 341, an instruction that one found in the possession of stolen goods was presumed to be the thief, and if he failed to account for his possession in a manner consistent with his innocence the presumption became conclusive, was held to be proper in the absence of evidence of good character. And see *State v. Gray*, 37 Mo. 463. See also *Hughes v. State*, 8 Humph. 75; *State v. Brown*, *supra*; *State v. Daly*, 37 La. Ann. 576.

⁴ *People v. Abbott* (Cal.), 36 Pac. 129.

⁵ *State v. Jennings*, and *State v. Kennedy*, *supra*.

⁶ *State v. Merrick*, 19 Me. 398. And see *Porterfield v. Com.* (Va.), 22 S. E. 352.

⁷ *Foster v. State*, 52 Miss. 695.

the jury for consideration. In this sense it is *prima facie* evidence, but not in the sense that it is such evidence as must compel the jury to a conviction unless it be rebutted.¹

And the defendant cannot be required to overcome the presumption by a preponderance of evidence. All that he can be required to do is to introduce evidence which creates a reasonable doubt whether he came honestly into the possession of the property.² Therefore, where a man was indicted for stealing a piece of wood, which was found in his shop five days after the theft, and he stated that he had bought it from a person whom he named, who lived about two miles off, it was held that the prosecutor was bound to show that the account was false.³ And where the defendant was found in possession of a stolen horse which he told the officer he "bought from a man near Austin," and on his trial proved the truth of his statement by a witness who detailed the circumstances of the purchase, it was held that the State must show the explanation false, or the prisoner must be acquitted.⁴

In another case the accused, in confirmation of his statement that he had purchased the property from another party, showed a bill of sale from such party.⁵ It must be shown that the defendant purchased the identical articles.⁶ Whether the purchase was in good or bad faith is immaterial, he being charged with the theft only.⁷ "It is a common mode of defence," says a learned writer, "to state a delivery by a person unknown, and of whom no evidence is given. Little or no reliance can consequently be had upon it. Yet cases of that sort have been known to happen where persons really innocent have suffered under such a presumption; and therefore where this excuse is urged, it is a matter of no little weight to consider how far the conduct of the prisoner has tallied with his defence from the time when the goods might be presumed to have first come into his possession."⁸

In such cases it is a question for the jury, whether there is a sufficiently reasonable account given by the prisoner to en-

¹ Boykin v. State, 34 Ark. 443. And see Ingalls v. State, 43 Wis. 647.

² State v. Richart, 57 Ia. 245.

³ Reg. v. Smith, 2 C. & K. 217.

⁴ Hyatt v. State (Tex. Crim. App.), 25 S. W. 291.

⁵ Roberts v. State, 17 Tex. Crim. App. 82.

⁶ Way v. State, 85 Ind. 409.

⁷ Faulkner v. State, 15 Tex. Crim. App. 115.

⁸ 2 East P. C., 665. And see State v. Jenkins, 2 Tyl. 379.

able the prosecutor to find the party named.¹ But these refinements are not strictly followed in practice, and are indeed not always easily capable of application. Thus, where a prisoner was convicted of stealing some articles of dress, and the evidence was that he was in possession of the stolen property recently after it had been stolen, that he sold it openly in a public-house, and on his arrest stated to the constable that C. and D. brought the things to his house, and that W., who was at his house, would say that it was true; and C., D., and W. were known to the constable, and might have been produced as witnesses, but were not called, and inquiries were made of W., but the result of the inquiry was not given in evidence; it was held that the conviction was good, and that it was not incumbent on the prosecutor to call the persons to whom the prisoner had referred to disprove his statement.²

Any explanation given by the accused of his possession, at the time he is found with the stolen property, is admissible, when his possession is relied upon as a criminative fact.³

The explanation should be given such weight as its inherent probability, coupled with the failure of the State to disprove it, where the means of doing so lie peculiarly within its power, may, in the judgment of the jury, entitle it to.⁴ In Texas it is declared that the possession of an animal without a bill of sale shall be illegal.⁵ But it cannot be inferred that the party in possession of an animal without a bill of sale is a thief. Failure to receive a bill of sale of property is not as strong evidence of guilt as failure to explain, when called upon, a possession of stolen property. Where the defendant offers as explanatory of his possession of property recently stolen, a bill of sale, the rule is stated to be, that "if the evidence tends to show an acting together, conspiracy, or complicity in the taking, between the vendor in the bill of sale and the defendant, the court may submit the *bona fides* of the bill of sale that the jury may ascertain and find whether or not it was a sham or device conceived to cover up and avoid the crime of theft."⁶

¹ Reg. v. Hughes, Cox C. C. 176.

² Reg. v. Wilson, 26 L. J. M. C. 7; Cox C. C. 310.

³ Goeus v. State (Tex. Crim. App.), 31 S. W. 656.

⁴ Payne v. State, 57 Miss. 348.

⁵ Tex. Rev. St. Art. 4563.

⁶ Clark's Crim. Law of Texas, 262 and note; Prator v. State, 15 Tex. Crim. App. 363; Roberts v. State, 17 Id. 82.

The possession which is shown to have had an inception subsequent to the offence does not raise the presumption. In one case the goods had been transported by common carrier from the town where the burglary was committed to another town, where they were called for and taken away by the defendant, who gave a false name. The court said this explained his possession so far as to prevent the application in its full force of the rule relating to the recent unexplained possession of stolen property, though it might be a very suspicious circumstance.¹

A person charged with larceny may explain his possession by showing what was said to him at the time he acquired possession.² The defendant and another were caught riding stolen horses. The defendant made no effort to escape, but his companion got away. The defendant then said that the horse belonged to his companion, who overtook him on the road and offered him the horse to ride to the town to which they were both going.³ In another case a conviction was reversed where the accused had been arrested, while driving a drove of cattle, for the theft of a steer which was in the drove. He had at once explained his possession by giving the names of the parties claiming to own the cattle and by whom he had been hired, and there was no evidence to overcome his explanation.⁴

If the State relies upon the fact that the defendant was in possession of the stolen property at different times, defendant has the right to introduce his explanations made at each time. There is no rule of law which confines a party to one explanation.⁵

The explanation itself may raise a suspicion of guilt. And if the account given be unreasonable or improbable on the face of it, or if the party have given different accounts of the same transaction, then he will not be relieved from the pressure of the general rule of presumption.⁶ In one case the prisoner was corroborated as to his statement that he had purchased the

¹ *Heed v. State*, 25 Wis. 421. And see *State v. Humason* (Wash.), 32 Pac. 111.

² *State v. Jordan*, 69 Ia. 506.

³ *Guajardo v. State*, 24 Tex. Crim. App. 603.

⁴ *Perry v. State*, *supra*.

⁵ *Castellon v. State*, 15 Tex. App. 551. See this case for facts illustrating the text.

⁶ *State v. En*, 10 Nev. 277; *Reg. v. Crowhurst*, 1 C. & K. 870; *Reg. v. Harmer*, 8 Cox C. C. 487; *Reg. v. Debley*, 2 C. & K. 818; *People v. Elster*, 5 Crim. L. Mag. 687; *Roscoe, Cr. Ev.* 21.

property ; but the detailed circumstances of the alleged purchase strengthened the suspicion of guilt.¹ Where property stolen was in the possession of the accused the next day after the theft, and was offered for sale by him, he stating that he had bought it at a public auction, and persons living in the vicinity where he said the auction had been held testified that there had been no auction there, a verdict of guilty is warranted.²

On the officers going to the house of a prisoner to search for the stolen goods, she denied having them ; but when they were found hidden, she said she had brought them with her from England. The goods having been satisfactorily identified by the owner, the prisoner said that she was so infirm as not to be able to leave her house, but this contention was not sustained, and she, having offered no evidence of good character, was found guilty of larceny.³ In a recent case the prisoner was accused of the larceny of a gold watch. It was shown that he had sold the watch, which was a valuable one, for a mere trifle ; that he had falsely stated he had bought it as a wedding present for his wife ; and that he had denied being at the place from which the watch had been taken, though it was satisfactorily shown that he had been there on the very morning. An instruction as to the presumption arising from recent possession was held proper, and judgment of conviction was affirmed.⁴ And where the accused had disposed of the property at a price below its value, and had made inconsistent statements at different times in relation to the possession, the jury was charged that the circumstance was strong and conclusive against the prisoner.⁵ But it is quite conceivable that a man found in the possession of stolen property might give false and contradictory accounts of the possession, and yet be innocent of the theft. And so, where this was the only incriminating evidence, it was held insufficient to support a conviction.⁶

¹ *State v. Schaffer*, 70 Ia. 371.

² *Towle v. State*, 47 Wis. 545.

³ *People v. Mary Smith*, 1 Wheel. Cr. C. 131.

⁴ *State v. Donovan* (Mo.), 26 S. W. 340.

⁵ *Armsteads' Case*, 1 City Hall Rec. 174. And see *Eubanks v. State*, 83 Ga. 62 ; *State v. Rodman*, 62 Ia. 456 ; *Conner v. State*, 6 Tex. Crim. App. 455.

⁶ *Norwood v. State*, 20 Tex. Crim. App. 306. The defendant in this case was charged with the theft of a horse belonging to one Little. The defendant had undoubtedly had recent possession of the horse ; and when called upon to explain he had given several contradictory accounts, and

And the fact that a party may not be able to show how and when he acquired possession of the property is by no means conclusive of guilt. He is not to be deprived of any other element of defence.¹ The presumption, though the possession be unexplained, is fully rebutted by satisfactory proof of an *alibi*. And where witnesses testified that the defendant was seventy-five miles distant from the place of a burglary at the time of its commission, the instruction concerning the presumption arising from the possession of the goods should have included a statement of the effect of such proof.² But the defendant cannot rebut the presumption by introducing witnesses to testify that they heard some one else say that *he* committed the offence. To allow such hearsay to rebut and overcome so strong a presumption would be equivalent to holding that the jury ought to acquit in any case where the prisoner could engage some one else to say that he committed the crime for which the prisoner was indicted, and then offer witnesses to prove that they had heard it said.³

Good character has a very important bearing in rebutting the presumption of guilt consequent on possession.⁴ And, in some cases, may be sufficient to entirely overcome the presumption.⁵ If a purse of money be stolen in a crowd, and soon after the theft the same be found in the pocket of a man of known reputable character, the pocket being such that the purse could have been put there without his knowledge, the circumstance would hardly raise a suspicion sufficient to lean a charge of theft upon.⁶

Thus, in a case where the defendant was accused of larceny, and the goods were found upon her, and her explanation was

had denied all knowledge of the person to whom he had sold the horse. It was also shown that he went under an assumed name. A witness was introduced by the State who testified that he had witnessed a horse-trade made by the defendant with a Mexican, and that the horse in controversy was the identical horse which the defendant had got in the trade.

¹ *State v. Bonin*, 34 Mo. 587; *State v. Jordan*, 69 Ia. 506.

² *State v. Edwards* (Mo.), 19 S. W. 91. To the same effect, see *State v. North*, 95 Mo. 616; *State v. Bonin*, *supra*; *State v. Snell*, 46 Wis. 524.

³ *Daniel v. State*, 65 Ga. 199.

⁴ *State v. Castor*, 98 Mo. 242; *State v. Kelly*, 73 Mo. 608; *State v. Crank*, 75 Mo. 406; *State v. Gray*, 37 Mo. 463; *Hughes v. State*, 8 Humph. 75; *People v. Preston*, 1 Wheel. Cr. Cas. 41.

⁵ *State v. Kelly*, 57 Ia. 644; *People v. Hurley*, 60 Cal. 78.

⁶ *Ingalls v. State*, 48 Wis. 647.

not wholly satisfactory, there was evidence of previous good character. The circumstances being doubtful, an acquittal was directed.¹

SECTION II.

The Element of Time.

It is manifest that the force of this rule of presumption depends upon the recency of the possession as related to the crime.² The possession of stolen property does not raise a presumption against the defendant unless so recent as to exclude the opportunity of others to steal the property.³ The lapse of eighteen months after the larceny has been held sufficient to rebut the presumption arising from possession of goods.⁴ What is recent possession depends upon the nature, value, and portability of the property.⁵ If the time be long and the property of such a character as to be easily handled, and readily transmissible, the presumption is very slight.⁶ The possession of a metallic or paper piece of money, five days after it was stolen, might have less weight as evidence than the possession of Powers' Greek Slave five years after the larceny of such property.⁷ The term "recent" is a relative term, and a time which might be considered recent under one state of facts would not be so under another and different state of facts. Thus in one case the money was not found until more than three months after it had been stolen, but the conditions existing when it was found tended to show that it had been in the possession of the accused a considerable length of time. Moreover, the presumption of guilty connection with the larceny was strengthened by the facts that from a time soon after the money was taken the accused had in his possession and expended unusually large sums of money, and

¹ *People v. Turrell*, 1 Wheel. Cr. Rep. 34.

² *Shepherd v. State*, 44 Ark. 39; *White v. State*, 72 Ala. 195; *State v. Williams*, 9 Ired. 140; *State v. Floyd*, 15 Mo. 349; *State v. Wolff*, 15 Mo. 108; *Gablick v. People*, 40 Mich. 292; *Pollard v. State* (Tex. Crim. App.), 26 S. W. 70.

³ *State v. White*, 89 N. C. 462; *Gregory v. Richards*, 3 Jones' L. 410; *State v. Williams*, 9 N. C. 140.

⁴ *Warren v. State*, 1 Ia. 106.

⁵ *State v. Castor*, 93 Mo. 242.

⁶ *Snowden v. State*, 62 Miss. 100.

⁷ *BAILEY, J.*, in *State v. Hodge*, 50 N. H. 510.

there was no explanation of the sources from which he received them.¹

The question as to when a possession is recent is usually one of fact for the jury.² The possession of a horse, for example, two months after theft, is a circumstance to be considered by the jury; but does not, even unexplained, raise a conclusive presumption.³ Where three sheets were found upon the prisoner's bed, in his house, three months after they had been stolen, Mr. Justice Wightman held that the case must go to the jury, on the ground that it was impossible to lay down any rule as to the precise time, which was too great to call upon the prisoner to account for the possession;⁴ and where seventy sheep were put upon a common on the 18th of June, but not missed until November, and the prisoner was proved to have had possession of four of them in October, and of nineteen more on the 23d of November, the judge allowed evidence of the possession of both to be given.⁵ And possession in one State of a slave stolen in another State five months before, was held, with the other circumstances, sufficient to justify conviction.⁶ In other cases convictions were had where twenty days,⁷ one month,⁸ and six weeks,⁹ respectively, had intervened; and the unexplained possession on Sunday morning of goods which had been stolen on Friday night was held sufficient to convict.¹⁰ Where two pieces of woollen cloth in an unfinished state, consisting of about twenty yards each, were found in the possession of the prisoner two months after being missed, and still in the same state, it was held that this was a possession sufficiently recent to call upon him to show how he came by the property.¹¹ In another case, Mr. Justice Bayley directed an acquittal, because the only evidence against the prisoner was, that the goods were found in his possession after a lapse of sixteen months from the time of their loss;¹² and where a shovel was found, six months after the theft, in the house of the prisoner, who was not then at home, Mr. Baron Gurney

¹ *Jenkins v. State*, 62 Wis. 49.

² *White v. State*, 72 Ala. 195.

³ *Curtis v. State*, 6 Cold. 9.

⁴ *Rex v. Hewlett*, 2 Russ. on Cr. (Greaves' Ed.) 728.

⁵ *Rex v. Dewhirst*, 2 Stark. 614.

⁶ *State v. Kinman*, 7 Rich. 497.

⁷ *State v. Williams*, 9 Ired. 140.

⁸ *Mondragon v. State*, 33 Tex. 490.

⁹ *State v. Johnson*, 1 Winst. 238.

¹⁰ *Brown v. State*, 59 Ga. 456.

¹¹ *Reg. v. Partridge*, 7 C. & P. 551.

¹² *Anon.*, 7 Monthly Law Mag. 58; 2 C. & P. 459.

held that on this evidence alone the prisoner ought not to be called upon for his defence.¹ Where the evidence against a prisoner, charged with the larceny of a saw and mattock, was that the stolen articles were found in his possession three months after they were missed, it was held that this was not such a recent possession as *per se* to put him upon showing how he came by them;² and where a stolen horse was found in the prisoner's possession six months after it was lost, Mr. Justice Maule held that this was no case to go to the jury.³ On a trial for the theft of a shirt it appeared that twelve months had elapsed from the time when the prisoner had access to the premises till the shirt was found upon him. There being no other circumstances to prove that the shirt had been stolen, this was held insufficient.⁴ In one case two years was held too great a length of time to raise the presumption;⁵ in others, five months;⁶ in another, four months;⁷ and in another, five weeks.⁸

But the possession of stolen property, whether recent or remote, is a circumstance to be considered by the jury in connection with the other evidence in the case.⁹ The remoteness of the time when the accused is found in possession of the property from the time when the crime is alleged to have been committed goes, not to the competency of the evidence, but to its weight.¹⁰

SECTION III.

The Nature of the Possession.

It is obviously essential to the just application of this rule of presumption, that the house or other place in which the stolen property is found should be in the *exclusive* possession of the prisoner.¹¹ The possession must be personal and must involve

¹ *Rex v. Cruttenden*, Best on Pres. 806 ; 6 Jurist, 267.

² *Rex v. Adams*, 3 C. & P. 600.

³ *Reg. v. Cooper*, 2 C. & K. 318.

⁴ *Reg. v. Hall*, 1 Cox C. C. 231.

⁵ *Beck v. State*, 44 Tex. 480.

⁶ *Yates v. State*, 37 Tex. 202 ; *Bragg v. State*, 17 Tex. Crim. App. 219.

⁷ *State v. Walker*, 41 Ia. 217.

⁸ *State v. Warford*, 15 S. W. 886.

⁹ *Moreno v. State*, 24 Tex. Crim. App. 401 ; *Lehman v. State*, 18 Tex. Crim. App. 174 ; *State v. Rights*, 82 N. C. 675 ; *State v. Williams*, 9 Ired. 140.

¹⁰ *Lindsey v. People*, 63 N. Y. 248.

¹¹ *State v. Taylor*, 20 S. W. 239 ; *State v. Castor*, 93 Mo. 242.

a distinct and conscious assertion of possession by the defendant.¹ The presumption may scarcely arise at all if others besides the accused have had equal access with himself to the place where the property is discovered.² Where it is found in the apartments of a lodger, for instance, the presumption may be stronger or weaker, according as the evidence does or does not show an exclusive possession. Where a conviction was had principally on evidence of possession, but the articles were not shown to have been in the possession of the defendant, but only in a house of which he was an inmate, his own domicil being a room different from that in which the articles were found, a new trial was granted.³ That the stolen property is found in possession of one for whom the defendant has been working will not raise the presumption against the defendant.⁴

The rule is strikingly illustrated in a case where there was nothing to connect the prisoner with the goods except the fact that they were found in his trunk. The trunk was in the mid-ship of a canal boat in which other persons resided, and to which any one might have access, and was brought to the boat by the prisoner about nine in the morning, at which time it was locked. It was not shown that the prisoner opened the trunk or that he thereafter went to it for any purpose. He left the boat about noon. The officer who discovered the goods first saw the trunk in the afternoon, the day after the prisoner left the boat. At that time it bore unmistakable evidence of having been broken open by violence. Only a small portion of the goods stolen were in the trunk. It was held that the law would not presume that the prisoner broke his own trunk open until it was shown that he had no key to it; and that the fact that a portion of the goods was found in the prisoner's trunk under such circumstances was little, if any, stronger than it would have been had they been found in some other part of the boat.⁵

As a general rule, where stolen goods are found in the house of a married man, they must be considered in his possession, and not in the possession of his wife, unless there be evidence

¹ Pollard v. State (Tex. Crim. App.), 26 S. W. 70; People v. Hurley, 60 Cal. 74; Shepherd v. State, 44 Ark. 39; Robinson v. State, 22 Tex. Crim. App. 690 (see facts); Moreno v. State, 24 Tex. Crim. App. 401; Field v. State, Id. 422; Williamson v. State, 17 S. W. 722.

² Gablick v. People, 40 Mich. 292.

³ Carter v. State, 46 Ga. 637.

⁴ State v. Wolff, 15 Mo. 168.

⁵ Davis v. People, 1 Park. Cr. R. 447.

of something specially to implicate her, such as statements made or acts done by her, in which case it must be left to the jury to decide in whose possession they were.¹ Therefore, where a wife was indicted with her husband for receiving stolen property, and it appeared that she had destroyed the property, it was held to be a question for the jury whether she had so dealt with it to aid her husband in turning it to profit, or merely to conceal his guilt, or screen him from the consequences.² And where a constable went with a warrant to search the prisoner's premises for stolen iron, and almost immediately after he was taken away from the premises, at the conclusion of the search, his wife carried some tin under her cloak from a warehouse on the premises, Mr. Justice Coleridge, on the trial of the prisoner for receiving stolen brass and tin, held that it was for the jury to consider whether her possession was not the prisoner's, she being upon the premises, and all the circumstances being taken into consideration, and that it was not like the case where the wife is in possession of stolen property at a distance from the premises of her husband.³ Where the defendant was found guilty of the theft of a woman's cloak, but two months after the cloak was missed it was found in the defendant's house in a trunk used by both him and his wife, neither was called on to explain the possession. On appeal it was said that the facts applied as well to the wife as to the defendant, and there being no sufficient circumstances developed by the evidence to fix a rational conviction in the mind that one rather than the other was the guilty party, the judgment was reversed.⁴ Where it is shown that the wife was with the husband when the goods were stolen, participating in the larceny, her possession is criminal evidence against both.⁵

Whether under the particular circumstances of the case the property is to be considered in the possession of the defendant, or not, is a question for the jury.⁶ In the case last cited the accused was indicted for the larceny of certain cattle which were found at his father's. There was testimony tending to

¹ Reg. v. Banks, 1 Cox C. C. 238; State v. Johnson, 1 Winst. 238.

² Reg. v. McClarens, 8 Cox C. C. 425. And see Reg. v. Brook, 6 Cox C. C. 151.

³ Reg. v. Mansfield, 1 C. & M. 342.

⁴ Perkins v. State, 32 Tex. 109.

⁵ State v. Philips, 91 Mo. 478.

⁶ State v. Brewster, 7 Vt. 118; State v. Van Winkle, 80 Ia. 15.

show that the defendant made his home at his father's. He was a single man, and, so far as appeared, had no other home. He always came there to stay when not at work elsewhere, and when there worked on the farm. In his testimony he spoke of the place as "our house." From this the jury might find possession in the defendant. And where the evidence tended to prove that the husband of the defendant aided in the commission of the theft, it was permitted the State to show that part of the stolen property was found in his possession.¹

On the trial of two men at Aberdeen, autumn circuit, 1824, it appeared that a carpenter's workshop at Aberdeen was broken open on a particular night, and some tools carried off, and that on the same night the counting-houses of Messrs. Davidson, and of Messrs. Catto and Co., in different parts of that city, were broken into, and goods and money to a considerable extent stolen. The prisoners were met at seven on the following morning in one of the streets of Aberdeen, at a distance from either of the places of depredation, by two of the police. Upon seeing the officers they began to run; and being pursued and taken, there was found in the possession of each a considerable quantity of the articles taken from Catto and Co., but none of the things taken from the carpenter's shop or Davidson's. But in Catto and Co.'s warehouse were found a brown coat and other articles got from Davidson's which had not been there the preceding evening when the shop was locked up; and in Davidson's were found the tools which had been abstracted from the carpenter's. Thus, the recent possession of the articles stolen from Catto and Co.'s proved that the prisoners were the depredators in that warehouse; while the fact of the articles taken from Davidson's having been left there, connected them with that prior housebreaking; while again, the chisels belonging to the carpenter's shop, found in Davidson's, identified the persons who broke into that last house with those who committed the original theft at the carpenter's. The prisoners were convicted of all the thefts.²

A still stronger case of the same kind occurred at Aberdeen, in April, 1826, on the trial of a man who was accused of no fewer than nine different acts of theft by housebreaking, com-

¹ State v. Wohlman, 84 Mo. 482.

² Rex v. Downie and Milne, Alison's Princ. 818; 2 Mascardus, *ut supra*, *Concl.* DCCCXXXI.

mitted in and around that place at various times during the summer of 1825 and the following winter. No suspicion had been awakened against the prisoner, who was a carter, living an industrious and apparently regular life, until one occasion, when some of the stolen articles having been detected in a broker's shop, and traced to his custody, a search was made, and some articles from all the houses broken open found amongst an immense mass of other goods, evidently stolen, in a large chest, and about various parts of the prisoner's house. Their number and variety, and the place where they were found, were quite sufficient to convict him of receiving the stolen property; but as they were discovered at the distance of many months from the times when the various thefts had been committed, the difficulty was how to connect him with the actual theft. The charges selected for trial were five in number, and as nearly connected with each other in point of time as possible. In none of them was the prisoner identified as the person who had broken into the houses, although the thief had been seen, and more than once fired at; but in all the first four houses which had been broken into were discovered some of the articles taken from the others, and in the prisoner's custody were found some articles taken from them all, which sufficiently proved that all the depredations had been committed by one person; and the mark of an iron instrument was found on three of the windows broken open, which coincided exactly with a chisel left in the last house. Two days after the housebreaking of that house, an old watch, part of the stolen property, was shown by the prisoner to a shopkeeper, to whom he soon afterwards sold it, and by him delivered up to the officers. Upon this evidence the prisoner was convicted of all the charges of housebreaking.¹

SECTION IV.

The Nature of the Crime to be Inferred.

The recent possession of stolen property may sometimes be referable, not to the crime of theft, but to that of having received it with a guilty knowledge of its having been stolen. There is

¹ Rex v. Bowman, Alison's Princ. 314.

no presumption that recent possession points more to stealing than receiving. In no case can recent possession be said to be exclusively *prima facie* evidence of stealing rather than of receiving, unless the party is found so recently in possession of the property, and under such circumstances, as to exclude the possibility of receiving.¹ In the case just cited, nothing appearing except that the prisoner was found in possession of the sheep stolen, several weeks after the theft, he was held to have been properly convicted of receiving. Four persons were found guilty of housebreaking on proof of the recent possession of the goods, and narrowly escaped execution, the offence at that time being capital; but it was afterwards ascertained that one of them, who had long been known as a receiver of stolen goods, knew nothing of the robbery until after it had been committed, and had purchased the goods from the real thieves the day after the robbery.²

The difficulty of referring the act of possession specifically to one of those crimes frequently led to the failure of justice; thus, where stolen goods were found shortly after the theft, concealed in an old engine-house, and the place being watched, the prisoners were seen to go there and take them away, but, being indicted as receivers, they were acquitted; Mr. Justice Patteson being of opinion that this seemed to be evidence rather of a stealing than a receiving.³ This was reviewed in England by St. 11 & 12 Vict. c. 46, § 3, which provided that in every indictment for feloniously stealing, a count might be added for feloniously receiving the same property, knowing it to have been stolen, and that in an indictment for feloniously receiving, a count might be added for feloniously stealing the same property. And similar statutes are in force in this country.⁴

It is not necessary that the receiver of stolen property should have obtained a guilty knowledge by direct information; it is sufficient if the circumstances under which it was received were

¹ Reg. v. Langmead, 9 Cox C. C. 464. And see Gregory v. Richard, 8 Jones' L. 410; People v. Antonio, 27 Cal. 404; State v. Jennet, 88 N. C. 665; Beck v. State, 44 Tex. 430; Yates v. State, 37 Tex. 202.

² Rex v. Ellis, Sessions Papers & A. R. 1831.

³ Reg. v. Dursley, 6 C. & P. 899. And see Rex v. Dyer, 2 East P. C. 767; Rex v. Howell, Id. 768.

⁴ Trimble v. State, 18 Tex. Crim. App. 632; Com. v. O'Connell, 12 Allen (Mass.), 451. See also State v. Stimson, 45 Me. 608; State v. Moultrie, 33 La. Ann. 1146.

such as must have satisfied any reasonable mind that it must have been dishonestly obtained ; as, if he purchased it at suspicious and unseasonable times, or from persons who in the ordinary course of things could not fairly be considered as the unsuspected owners of property of the particular description, or had secreted or endeavored to secrete it, or attempted to explain the manner of acquisition by falsehood or prevarication.¹ And the fact that property is saleable merchandise, having a market value, and that it is offered for one-third its value, and that the offers to sell are repeated from time to time, are circumstances of an unusual character calculated to excite the suspicions of an honest man, and are sufficient to go to the jury on the question of guilty knowledge. A pawn of property at one-third its value would not be evidence that it was stolen ; but a sale of marketable property at that price might be most significant.²

However, the result will depend on the circumstances of each particular case. In an early case in New York the indictment was for receiving stolen goods, knowing them to be stolen, and the circumstances against the defendant were that he bought the goods at a reduced price ; that the amount was large ; that he bought from a young man whom he did not know and without making any inquiry ; that the goods were found in a trunk, thrown in in a confused manner, and in an upstairs room rather than in his store. But there were circumstances in favor of the accused, and evidence was introduced of his hitherto unexceptionable character, and he was acquitted.³

The possession of stolen goods recently after the loss of them may be indicative, not merely of the offence of larceny, or of receiving with guilty knowledge, but of any other more aggravated crime which has been connected with theft.⁴ And the presumption applies as well to arson and burglary as to larceny.⁵

Upon an indictment for arson, proof that property which was in the house at the time it was burnt was soon afterwards found in the possession of the prisoner was held to raise a pre-

¹ Alison's Princ. 830.

² Copperman v. People, 56 N. Y. 591. And see Hale's P. C. 619.

³ People v. Cochran, 1 Wheel. Cr. Rep. 81.

⁴ Knickerbocker v. People, 43 N. Y. 177.

⁵ State v. Moore, 22 S. W. 1086 ; State v. Warford, 15 S. W. 886 ; State v. Owens, 79 Mo. 619 ; State v. Wheeler, 79 Mo. 866 ; State v. Babb, 76 Mo.

sumption that he was present and concerned in the offence.¹ And again, it was held proper to show, on a trial for arson, that goods claimed by the prosecution to have been taken from the burned house on the day of the fire, together with other goods not shown to have been taken from the house, but belonging to the owner of the house, were found locked up in trunks in the defendant's possession.²

A boy on being taxed with a burglary, and on being told that the witness "knew all about it and he might as well own up," went away, and in a short time returned with the article stolen and delivered it up, but without making a confession. He was convicted; but the judge having failed to give the charge required relating to circumstantial evidence, the judgment was reversed.³

In a Georgia case,⁴ the court seemed to doubt whether mere possession of the lost property might not be sufficient to convict of burglary; but there was no positive decision. And it has frequently been asserted that possession alone, unsupported by other facts indicative of guilt, is not *prima facie* evidence that the accused committed the burglary.⁵ Where the defendant was found in possession of a satchel containing the stolen property, this alone was held insufficient to convict of burglary.⁶ But in a case where goods have been feloniously taken by means of a burglary, and they are soon after found in the actual and exclusive possession of a person who gives a false account, or refuses to give any account of the manner in which he came to the possession, proof of such possession and guilty conduct is presumptive evidence, not only that he stole the goods, but that he made use of the means by which access to them was obtained.⁷

In another case, where burglary was charged, the entry was proved to have been made through a window which was broken open in the back of the house. The impress of the

¹ *Rex v. Rickman*, East's P. C. 1085. And see *Rex v. Fuller*, R. & R. 308, and *Fletcher v. State*, 17 S. E. 100; 90 Ga. 468.

² *State v. Vatter*, 71 Ia. 557; 82 N. W. 506.

³ *Parker v. State*, 20 Tex. Crim. App. 451.

⁴ *Houser v. State*, 58 Ga. 78.

⁵ *Ryan v. State*, 83 Wis. 486; *Stuart v. People*, 42 Mich. 255; *People v. Frazier*, 2 Wheel. Cr. Rep. 55; *Black v. State*, 18 Tex. Crim. App. 124.

⁶ *People v. Gordon*, 40 Mich. 716.

⁷ *Com. v. Willard*, 1 Mass. 6. See *Dimmitt v. State* (Ia.), 55 N. W. 531.

prisoner's shoe was proved to have been found in the garden in front of the house ; but this was held not sufficient to connect the prisoner with the crime, because it was not proven that the impression was not made in the daytime, and while the prisoner was lawfully in the garden. The prisoner was found on the night following the burglary asleep in a corn-bin in an open pig-house. Just outside the bin, and also in another part of the pig-house, were found concealed some of the stolen articles. But the prisoner claimed none of them, and his connection with them was not traced. The jury was charged that possession had not been proved and an acquittal was directed.¹

But it is not necessary that there should be direct evidence, in addition to the possession of the stolen property, it being sufficient if there are other circumstances connecting the defendant with the crime.²

This particular fact of presumption commonly forms also a material element of evidence in cases of murder ; which special application of it has often been emphatically recognized.³ It is upon the same principle that a sudden and otherwise inexplicable transition from a state of indigence and a consequent change of habits, or a profuse or unwonted expenditure inconsistent with the position in life of the party, is sometimes a circumstance extremely unfavorable to the supposition of innocence.⁴

In a case before cited,⁵ it was proved that the prisoner, the son of a farmer neighboring to the murdered man, was without means of his own, but that on the day of the crime he had bought clothing and was in possession of a considerable quantity of coin. This, united with the facts that the deceased had in his possession a year or so before an amount of coin, that he lived remote from any place of deposit, and that it was a time of suspension of specie payments, when silver and gold would likely be hidden around the man's house, was a strong indication connecting the prisoner with the crime. In another

¹ Reg. v. Coots, 2 Cox C. C. 188.

² People v. Sansome (Cal.), 33 Pac. 202; 84 Cal. 449.

³ People v. Johnson, 2 Wheel. 361 ; Reg. v. Manzano, 2 F. & F. 64 ; Lindsay v. People, 63 N. Y. 143. And see also Pharr v. State, and Betts v. State, *infra*.

⁴ Rex v. Burdock, Bristol Summer Ass., 1835 ; Rex v. Varnham, *infra* ; Brown v. Com., *infra*.

⁵ Brown v. Com., 76 Pa. St. 319.

murder trial¹ the fact that the defendant had in his possession at the time of his arrest, on the day after the murder, property which was in the possession of the deceased just before the murder, was admissible to go to the jury with the other evidence, to be considered for whatever value they might put upon it. Again, the facts that the prisoner had, at the time of his arrest, money which he attempted to conceal by throwing it behind him, and that he denied all knowledge of it on being questioned, and that the denomination of one of the bills corresponded with that of bills the murdered man was known to have received a short time before he was killed, were admitted.² A prisoner had about the amount of money which the deceased probably had with him at time of his death, but pretended to have only a few dollars, and after arrest attempted to conceal the money.³

But the rule must be applied with discrimination, for the bare possession of stolen property, though recent, uncorroborated by other evidence, is sometimes fallacious and dangerous as a criterion of guilt, being consistent in many instances with entire innocence.⁴ Sir Matthew Hale lays it down, that "if a horse be stolen from A., and the same day B. be found upon him, it is a strong presumption that B. stole him; yet," adds that excellent lawyer, "I do remember before a learned and very wary judge, in such an instance, B. was condemned and executed at Oxford Assizes, and yet within two assizes after, C., being apprehended for another robbery, and convicted, upon his judgment and execution confessed he was the man that stole the horse, and being closely pursued, desired B., a stranger, to walk his horse for him, while he turned aside upon a necessary occasion, and escaped; and B. was apprehended with the horse and died innocently."⁵ A very similar case occurred at the Surrey Summer Assizes, 1827, where a young man was convicted of stealing two oxen. The prisoner, having finished his apprenticeship to a butcher at Monkswearmouth, went to visit an uncle at Portsmouth, from whence he set out to return to London. On the road between Guildford and London, about three o'clock in the morning, he overtook a man riding

¹ Pharr v. State, 9 Tex. Crim. App. 129.

² Betts v. State, 66 Ga. 508.

³ State v. Holden, 48 Minn. 350.

⁴ 3 Greenl. on Ev. § 81; Stokes v. State, 58 Miss. 677.

⁵ Hale's P. C. C. 89.

upon a pony and driving two oxen, who, finding that he was going to London, offered him five shillings to drive them for him to London, which he agreed to do, the man engaging to meet him at Westminster Bridge. At Wandsworth he was apprehended by the prosecutor's son, and charged with stealing the oxen. On his apprehension he assumed a false name, under which he was tried, to conceal his situation from his friends, and convicted, but on a representation of the circumstances he received a pardon, when on the point of being transported for life.¹ He had been the dupe of the real thief, who, finding himself closely pursued, had thus contrived to rid himself of the possession of the cattle. On a trial for murder the principal evidence against the prisoner was that in his possession were found clothes which were identified as having been in the house on the morning of the murder. The prisoner set up the defence that the clothes had been given him by another, presumably to facilitate the latter's escape. But the jury returned a verdict of guilty.²

Identity of stolen goods is sufficiently proved by testimony that they are goods of the same description as those stolen, and by the positive identification of other stolen goods found with them, and the fact that the defendant in whose possession the goods were found, was employed in the place from which the goods were stolen at the time they were taken.³ And the rule is fairly and properly applied in circumstances where, though positive identification is impossible, the possession of the property cannot without violence to every reasonable hypothesis but be considered of a guilty character; as in the case of persons employed in carrying tea, sugar, tobacco, and other like articles from ships and wharfs. Cases have frequently occurred of convictions of larceny, in such circumstances, upon evidence that the parties were detected with property of the same kind upon them recently after coming from such places, although the identity of the property as belonging to any particular person could not be proved otherwise.⁴ On this principle two men were convicted of larceny upon evidence that the prosecutor's soap-manufactory, near Glasgow, had been broken into in the night and robbed of about 120 lbs. of yellow soap, and

¹ *Rex v. Gill*, Session Papers and A. R. 1837.

² *Reg. v. Manzano*, 2 F. & F. 64.

³ *People v. Ferguson*, 1 City Hall Rec. 65.

⁴ 2 East's P. C. 1035.

that the prisoners were met on the same night, about eleven o'clock, by the watchman, near the centre of the city, from whom they attempted to escape, one bearing on his back forty pounds of soap of the same size, shape, and make as that stolen from the prosecutor's premises, and the other with his clothes soiled over with the same substance, though the property could not be more distinctly identified.¹

And where the prosecuting witness testified that bacon which had been stolen was unsmoked and had a yellow mould on it, and the bacon found was unsmoked and had yellow mould on it and she believed it to be hers, there being some evidence that the defendant was connected with the theft, he was convicted.² Property charged to have been stolen was 28 bars of pig-iron. And the evidence of the agent having it in charge, and who was sole agent at the time for its sale, was, that it bore the marks and presented the appearance of the iron in his possession, some of which, he testified, had been taken away from the premises where it was deposited, and from a boat having a portion of it on board, during the night, in the early morning of which the defendant was arrested. His testimony was that he did identify the iron when he saw it in the following afternoon by its marks and looks. This, with the fact that it was found on the defendant's boat on the river, at half-past three o'clock in the morning, and his subsequent statement that it was bought of a canal captain for fifteen dollars, when the uncontradicted evidence was that its value was about fifty-two dollars, were held sufficient to justify the submission of the question of the identity of the property to the jury. As will be seen, in this case, the evidence of the agent showed that a larceny of the iron had been probably committed; that the quantity taken was similar to that found in the prisoner's possession; that it had the marks and appearances of the iron in the agent's custody, and that no other iron of that description was at the time, probably, on deposit or for sale in the vicinity.³

The possession of money of the same kind as that which was recently stolen is usually of slight, if any, weight as evidence to prove the guilt of the person in whose possession it is found, if money of this kind is in general circulation at that place; but it is of much greater significance when that kind of money is

¹ *Rex v. McKechnie et al.*, Alison's Princ. 822.

² *State v. Kent*, 65 N. C. 811.

³ *Dillon v. People*, 1 Hun, 670.

rarely seen in circulation at that place, and its value as evidence is further increased where both the money found in the possession of the accused and that which was stolen consists of a combination of pieces of such money; as, in one case, of a large number of Chilian half ounces and a single Peruvian ounce.¹ When stolen bank bills have no particular marks of identification, but the manner of folding, denomination, and general appearance is the same as of those found in the possession of the defendant, this is sufficient to cast on him burden of accounting for his possession.² And where bank bills of the same denomination as the money stolen were found in the possession of the defendant, it was held that he could not offer by way of explanation—without showing that the bills were the same—that two or three months before he had bills of a like denomination.³

It is not necessary that the owner of stolen goods found in the possession of the defendant should give a description of them sufficient to identify them before they are exhibited to him in court for his identification.⁴ And on a trial for the larceny of certain horses the objection that the testimony of the witness who saw the defendant shortly after the larceny in possession of some horses, does not sufficiently identify such horses as the ones that were stolen, goes not to the competency of the testimony but to its weight.⁵

SECTION V.

Corroborative Circumstances.

It is seldom, however, that juries are required to determine upon the effect of evidence of the mere recent possession of stolen property; from the very nature of the case, the fact is generally accompanied by other corroborative or explanatory circumstances of presumption. If the party have secreted the property, if he deny that it is in his possession, and such denial be discovered to be false, if he cannot show how he became possessed of it, if he give false, incredible, or inconsistent accounts of the manner in which he acquired it, as that he found

¹ *People v. Getty*, 49 Cal. 581. See opinion delivered in this case.

² *State v. Buckley*, 60 Ia. 471.

³ *State v. Graham*, 65 Ia. 617.

⁴ *State v. Lull*, 37 Me. 246.

⁵ *State v. Ingram*, 16 Kan. 14.

it, or that it had been given or sold to him by a stranger, or left at his house, if he have disposed of or attempted to dispose of it at an unreasonably low price, if he have absconded or endeavored to escape from justice, if other stolen property, or house-breaking tools, or other instruments of crime be found in his possession, if he were seen near the spot at or about the time when the act was committed, or if any article belonging to him be found at or near the place where the theft was committed, at or about the time of the commission of the offence, if the impression of his shoes or other articles of apparel correspond with marks left by the thieves, if he have attempted to obliterate from the articles in question marks of identity, or to tamper with the parties or the officers of justice, these, and all like circumstances, are justly considered as throwing light upon and explaining the fact of possession, and render it morally certain that such possession can be referable only to a criminal origin, and cannot otherwise be rationally accounted for.

The possession of a large amount of money several weeks after the criminal act, not identified as the stolen property, in connection with the previous poverty of the defendant, was admitted as tending to prove a single act of larceny.¹

It is not necessary that the possession of all the goods stolen should be traced to the defendant. The possession of a part of the stolen goods, of the smallest value, in connection with other circumstances may clearly fix the guilt of stealing all upon the defendant.² Where the defendant gave away at the same time different recently stolen articles, this fact is sufficient to warrant the conclusion that he took the articles at one time.³

¹ *Com. v. Montgomery*, 11 Met. 584.

² *State v. Phelps*, 91 Mo. 478. To the same effect, see *State v. Beatty*, 90 Mo. 142; *State v. Owens*, 79 Mo. 619; *State v. Davis*, 78 Mo. 129; *State v. Barker*, 64 Mo. 282; *Knickerbocker v. People*, 48 N. Y. 177.

³ *Jack v. State*, 20 Tex. Crim. App. 656.

CHAPTER V.

UNEXPLAINED APPEARANCES OF SUSPICION, AND ATTEMPTS TO ACCOUNT FOR THEM BY FALSE REPRESENTATIONS.

As a general rule, to which the exceptions can be but rare, it is a reasonable conclusion, that an innocent party can explain suspicious or unusual appearances, connected with his person, dress, or conduct; and that the desire of self-preservation, if not a regard for truth, will prompt him to do so. The ingenious and satisfactory explanation of circumstances of apparent suspicion always operates powerfully in favor of the accused, and obtains for him more ready credence when the explanation may not be easily verified. On the other hand, the force of suspicious circumstances is augmented whenever the party attempts no explanation of facts which he may reasonably be presumed to be able and interested to explain.¹ The mere presumption of innocence does not overthrow the presumptions from the unexplained facts.² A woman was indicted for the murder of her infant child. The dead body of a newly-born and well-developed child had been found in a dry well within a few yards of the defendant's house. Its skull was fractured, and a cord was tightly fastened around its neck. The woman denied having given birth to a child. But it was shown that she had been, a few days before the discovery of the body, in an advanced stage of pregnancy, and that later all signs of pregnancy had disappeared. Her bed-clothing and mattress were saturated with blood; and she was seen washing clothes which were bloody, and refused to say whose clothes they were. The defendant, having refused to offer any explanation as to any of the suspicious circumstances, was convicted.³

A peculiar case was a proceeding for partition by one claiming under a deed which purported to have been made by three

¹ State v. Ingram, 16 Kan. 14.

² Echols v. State, 81 Ga. 696.

³ Echols v. State, *supra*.

out of seven heirs. The instrument was executed by the marks of the makers, when it was known that they could write their names, and it was not brought to light for about fourteen years subsequent to its date, and after those whose deed it purported to be were dead. No explanation having been attempted for such unusual circumstances, the petition was denied.¹

Where two were indicted for passing a counterfeit bill, it was considered a strong indication of their guilt that on their examinations each charged the other with passing the bill, and neither of them gave any satisfactory explanation of the possession of it.²

As has been heretofore remarked, in cases of circumstantial evidence the jury should have before them every fact, however slight, which would aid them in reaching a satisfactory conclusion.³ Very slight circumstances, when taken with others, may assume importance; such as, that a light was seen in the house of the prisoner at an unusual hour of the night, about the time when he was supposed to have murdered the deceased there.⁴ Evidence was admitted, in one case, that the defendant was seen, shortly after the commission of the theft of which he was accused, on an untravelled, out-of-the-way road, instead of going along the public highway.⁵ A woman was indicted for the murder of her son-in-law by poison, and the prosecution, to support the contention that the deceased's wife was accessory to the crime, were allowed to show that the two women slept together on the night after the murder, and that they were heard whispering together for some time after retiring. Though this, standing alone, might not be a very suspicious circumstance, it was rightly submitted to the jury in connection with other facts.⁶

Though it cannot be necessary in every case before a conviction for burglary can be had, to show that the defendant was seen near the place where the burglary was committed, and about the time of its commission, yet the fact that he was so seen may be a circumstance tending to show guilt.⁷

¹ *Watson v. Robertson's Heirs*, 15 Tex. 333.

² *Reynolds' Case*, 2 City Hall Rec. 47.

³ *Pogin v. State*, 12 Tex. Crim. App. 283, and *supra*.

⁴ *People v. Johnson*, 2 Wheel. Cr. Cas. 361.

⁵ *Green v. State*, 12 Tex. Crim. App. 51.

⁶ *People v. Bemis*, 51 Mich. 422.

⁷ *People v. Flynn*, 73 Cal. 511.

It is a circumstance of suspicion against the accused that he was in the company of one known to have been implicated in the crime charged shortly before, or soon after, the commission of such crime, especially when he offers no explanation of his business with such person.¹ It was shown in one case that, on the day after the theft, the accused was seen talking to the persons in whose possession the stolen goods were found.² The defendant was charged with having committed a burglary on November 2, and it was shown that on October 25, he was seen in company with one who was convicted of the burglary charged, that they occupied a room together before and after the burglary, and that they were seen together on the evening of November 2.³ The accused was seen in the company of two men who were identified as having committed a robbery, immediately before the offence, riding toward the place of the commission of the offence, and again, soon after the offence, riding away from the place, and the tracks of whose horses were found near the place of the robbery. Defendant was convicted.⁴

On a trial for larceny from a building, the government set up the theory that the arrangement was that one defendant should distract the attention of an employer in the building, while the other should steal the money, and a third person keep watch outside, and evidence was admitted that the three were seen together shortly before the larceny walking toward the place of the larceny, and were seen together in the same street the morning after.⁵ On a trial for robbery, testimony that the accused was seen at various places in the neighborhood on the day preceding the night of the robbery; that he made inquiries and statements about purchasing tobacco, which indicated that they were pretexts; that he had apparently some connection with two other strangers whom he met at the hotel, was competent as circumstantial evidence in connection with the narrative of the prosecuting witness.⁶ The defendant, accused of homicide, was the last person seen with the deceased on the night of the killing, going toward the spot where the

¹ *Langford v. State*, 17 Tex. Crim. App. 445.

² *Langford v. State*, *supra*.

³ *People v. Burns*, 87 Mich. 537.

⁴ *Odle v. State*, 13 Tex. Crim. App. 612.

⁵ *Com. v. Griffin et al.*, 4 Allen, 310.

⁶ *Com. v. Williams*, 105 Mass. 62.

body was found.¹ After his return to his boarding-place he asked for water, and was heard to make a noise, as though washing himself. The next morning he traded clothing with a third party, and blacked his boots, a thing he had not been known to do before during the six weeks that he had boarded in that place. He told a woman whom he owed that he had no money to pay her, but afterwards, on the same morning, made another woman a present of money which he took from a pocket-book identified as belonging to, or exactly like, one owned by the deceased. He was heard to threaten to kill witnesses if they swore against him. These circumstances were held sufficient, in the absence of any explanation, to justify a verdict of guilty.² Under a charge of larceny, the evidence showed that the stolen cotton was traced to the vicinity of the defendant's residence, and was hidden in a pine thicket near by; that the wagon and human tracks, which led to the point where the cotton was deposited, led also from that place to the defendant's house; that one of the footprints corresponded with his tracks, which had some marked peculiarities, and the impression made by the wheels of the wagon strongly resembled those made by the wheels of one of the wagons found where the defendant lived; and that no other person dwelling there had so large and peculiar a foot as he. These facts not being explained by the prisoner, a conviction was held to have been warranted.³

An old man on his way home from market, where he had stayed late, was attacked, thrown down, and robbed by three men, one of whom he wounded in the struggle with a clasp-knife. Upon the apprehension of one of the robbers at the house of his mother, he was dressed in a new pair of trousers, and the constable found in a room upstairs, between the bed and the mattress, a pair of trousers with two long cuts in one thigh, one of which had penetrated through the lining, and was stained with blood at that spot; and the holes had been sewed with thread which was not discolored, showing that the blood must have been applied to the cloth previous to the repair; and a corresponding cut bound over with plasters was found on the prisoner's thigh. He refused to give any explanation of the

¹ See also *McGill v. State*, 25 Tex. App. 556.

² *Jackson v. State*, 9 Tex. Crim. App. 114.

³ *Bryan v. State*, 74 Ga. 538.

wound or of the cuts in the garments, and was convicted and transported.¹

It was considered a strong circumstance, justifying suspicion, of one accused of homicide, that, while the whole community was in great excitement over the murder, though he lived within a convenient distance, he neither visited the scene of the murder, nor the home of the deceased, nor did he offer his services or condolences, in any manner, to the bereaved family.²

But circumstances of suspicion merely, without more conclusive evidence, are not sufficient to justify conviction, even though the party offer no explanation of them.³ It is not, for instance, a sufficient circumstance to authorize a conviction for larceny that the accused had been keeping bad company.⁴ Where it is in the power of one accused of crime to show, if he is not the guilty party, where he was at the time when the crime was committed, and he makes no effort to bring forward such evidence, this circumstance is sufficient to create a strong presumption against him, but is not conclusive.⁵ Two women were indicted for coloring a counterfeit shilling and sixpence, and a man as counselling them; and the evidence against him was that he visited the women once or twice a week, and that the rattling of copper money was heard while he was with them; that once he was counting something just after he came out; that on going to the room just after their apprehension, he resisted being stopped, and jumped over a wall to escape, and that there were found upon him a bad three-shilling-piece and five bad sixpences: upon a case reserved, the judges thought the evidence too slight to convict him.⁶

So natural and forcible is this rule of presumption, that the guilty are instinctively compelled to endeavor to evade its application, by giving some explanation or interpretation of adverse facts, consistent, if true, with innocence; but its force is commonly aggravated by the improbability, or absurdity even, of such explanations, or the inconsistency of them with admitted or incontrovertible facts. All such false, incredible, or contradictory statements, if disproved or disbelieved, are not

¹ *Rex v. Dawtrey*, York Spr. Ass. 1841.

² *Dean v. Com.*, 32 Grat. 912.

³ *Newman v. State*, 26 Ga. 637.

⁴ *Orr v. State*, 34 Ga. 842.

⁵ *Gordon v. People*, 33 N. Y. 501.

⁶ *Rex v. Isaacs*, 3 Russell (9th Amer. Ed.), 216.

simply neutralized, but become of a substantive inculpatory effect. Mendacity is a circumstance against the person who resorts to it.¹ The fabrication of false and contradictory accounts by an accused criminal for the sake of diverting inquiry or casting off suspicion, is a circumstance always indicatory of guilt.² An explanation for the execution of a conveyance which is false, may itself authorize the conclusion that the conveyance is fraudulent.³ And where the prisoner, accused of theft, had, on a day subsequent to the stealing, an unusual quantity of money which he accounted for in a false way, a verdict of guilty was held to be justified.⁴ On a trial for murder by drowning, the prisoner had five marks on his hand which were supposed to have been made by the finger-nails of the deceased in the death-struggle, and the prisoner's contradictory statements as to the cause of these scratches were admitted as a circumstance against him.⁵ On the trial of a husband for the murder of his wife by poison, it was shown that false and contradictory accounts had been given by the prisoner, both as to the purchase of the poison, and his whereabouts immediately thereafter.⁶ And on the trial of another cause of the same nature it appeared the accused had made contradictory statements as to the use for which the poison was intended. And it was shown that the defendant had told the servant whom he had sent after the strychnine, to say, if any one asked what had become of the powder, that it had been stolen out of his coat-pocket while his coat was hanging in a restaurant.⁷

On the trial of an indictment for murder, the State introduced as a witness one Dodge, who testified that he went to the jail where the defendant was confined, with a certain gun and pawn-ticket, and asked the defendant in the presence of one Shuman if he knew the gun, and if he had signed the ticket, and that the defendant denied all knowledge of the gun and also denied signing the ticket. The witness testified that he then asked Shuman in the defendant's presence if the defendant signed

¹ Lovett v. State, 60 Ga. 257.

² Cathcart v. Com., 87 Pa. St. 109. And see State v. Holden, 43 Minn. 350; McDonald v. State, 22 S. W. 408.

³ Little v. Ragan, 88 Ky. 821.

⁴ Thomas v. State, 18 Tex. Crim. App. 493.

⁵ Cheverins v. Com., 8 Crim. L. Mag. 760.

⁶ McMeen v. Com., 114 Pa. St. 800.

⁷ Roe v. State, 25 Tex. App. 33.

the ticket, and Shuman replied that he did, and that the defendant then said that he did not sign it, and also said again that he had never seen the gun or the ticket. The gun was identified by three witnesses as having been the property of the deceased at the time of the homicide. Shuman testified that he was a pawnbroker, and that on a date five days after the homicide, but before the discovery of the crime, the defendant brought the gun to the place of business of the witness and pawned it to him, signing two pawn-tickets; one of which was retained by the witness, the other being given to the defendant. Other evidence showed that the pawn-ticket which Shuman identified as the one he gave the defendant was found concealed at a place where the defendant had been seen to go. The Supreme Court held that the defendant's denial of ever having seen the gun or signed the ticket was a circumstance proper for the jury to consider with other circumstances in determining his guilt.¹

In a trial for malicious shooting, it appeared that the prosecuting witness had returned the fire with a shot-gun. It was clearly proper to admit evidence in rebuttal that the accused had attempted to account for gunshot wounds upon his person in a manner contradictory to his testimony on the trial.²

But even in such circumstances, however, guilt cannot be safely inferred, unless there has been laid such a substratum of evidence, direct or circumstantial, as creates a strong independent *prima facie* case against the prisoner.³ On a trial for the murder of a female by poison, whom the prisoner alleged to have died from the effects of a draught taken by her in anger during an altercation between them, Mr. Baron Parke told the jury that it was for them to say whether the falsehoods the prisoner had told did not show that he was conscious that he had been guilty of some act that required concealment; that it was very true he might not wish it to be known he had been visiting a woman who, there was good reason to believe, had formerly been his mistress; but that, if he was an innocent man, and had been present at the death, one would have supposed he would have disclosed it immediately and called in

¹ *McDonel v. State*, 18 Cent. L. J. 874.

² *Logan v. Com.*, 16 Ky. L. Rep. 508; 29 S. W. 632.

³ Per Mr. Justice LITTLEDALE, in *Rex v. Clark*, Warwick Summer Ass., 1831.

some assistance. They had here two untruths : that he meant to dine at the west end of the town and did not, and his denial that he had been out of London that evening ; these, he said, were very material matters for their inquiry, bearing in mind that upon the evidence there was a very ample case for grave consideration, to show that the deceased died of prussic acid, and that the prisoner was present in the house at the moment of that death. His lordship added, that if the prisoner's representation had been true, that the deceased had poisoned herself, one would have supposed that he would have taken the first opportunity, having been present at the time this occurred, of exonerating himself from it, by making this declaration to the first person he met ; one would expect if he had been a man of the least cordial feeling, he would have waited to see whether it was true or not that she had taken this poison, and called for assistance, instead of which, he is proved to have gone in a short time to London, and when he got to London he is proved to have denied altogether that he had been there. You must judge, said the learned Baron, of the truth of the case against a person by all his conduct taken together.¹

Allowance must nevertheless be made for the weakness of human nature and for the difficulties which may attend the proof of circumstances of exculpation ;² and care must be taken that circumstances are not erroneously assumed to be suspicious without sufficient reason.³

¹ Reg. v. Lawell, Aylesbury Spr. Ass. 1845.

² Rex v. Gill, *ut supra*, 62, and 2 Hale's P. C. ch. 39.

³ Rex v. Looker, and Rex v. Thornton, *infra*.

CHAPTER VI.

CONFESSIONAL EVIDENCE.

SECTION I.

General Consideration of the Rules Relating to Confessions.

A CONFESSION of guilt partakes rather of the nature of positive than of circumstantial evidence.¹ But though the subject of direct confession does not fall within the province of this volume, it is necessary to advert to some of the principal rules which relate to that important head of moral evidence, because they are of great moment in their application to such particulars of circumstantial evidence as are only indirectly in the nature of confessional evidence.

Confessions are *judicial* or *extrajudicial*. Judicial confessions, say Prof. Greenleaf, are those which are made before the magistrate, or in court in the due course of legal proceedings. Extrajudicial confessions are those which are made by the party elsewhere than before a magistrate, or in court; this term embracing not only explicit and express confessions of crime, but all those admissions of the accused from which guilt can be implied.²

¹ Langdon v. People, 133 Ill. 382; Eckert v. State, 9 Tex. Crim. App. 105; White v. State, 32 Tex. Crim. App. 625.

But confessional evidence may be circumstantial, as, for instance, if it be of a fact which is itself but a circumstance. Eberhardt v. State, 47 Ga. 598.

² 1 Greenl. on Ev. § 216. And see U. S. v. Williams, 1 Cliff. 5.

Statements of the defendant which do not amount to an actual confession of guilt, but are admissions of isolated facts from which guilt can be inferred, are relevant and admissible. Ettinger v. Com., 98 Pa. St. 338; Luby v. Com., 12 Bush (Ky.), 1.

Where testimony was to the effect that on the day the assaulted party, while riding a horse, was injured, the defendant had declared that he had

Many of the earlier cases in England went to an extreme in rejecting confessions, and too frequently sacrificed justice and common sense at the shrine of mercy.¹ Confessions, unless the circumstances under which they are made show them not to have been voluntary, are admissible,² and are among the most effectual proofs of guilt.³ In order that confessions may be admitted in evidence, it must appear that they were voluntary.⁴ Confessions or disclosures extracted by any threat, or obtained by the influence of any promise, or encouragement of any hope or favor, are inadmissible in criminal prosecutions.⁵ The confession, which is inadmissible on the ground of not having been voluntarily made, must have been induced by some fear of personal injury, or hope of personal benefit of a temporal nature, unless the collateral inducement be so strong as to make it reasonable to believe that it might have produced an untrue statement as a confession.⁶ But however slightly the emotion of hope or fear may be implied, the confession thus obtained is inadmissible.⁷ If, however, the confession is not so connected with any threat or promise as to be a consequence of it, it is to be regarded as voluntary, and, of course, admissible.⁸

"shot at the man that rode his horse," it was held that this was not tantamount to an admission by the accused that he had committed the deed for which he was on trial, and that it was only by a process of inference that the jury could so conclude. *Eckert v. State*, 9 Tex. Crim. App. 105.

¹ Baron PARKE, in *Reg. v. Baldry*, 12 Eng. L. & Eq. 590.

² *Miller v. State*, 25 Wis. 384; *Basye v. State* (Neb.), 63 N. W. 811; *Eberhardt v. State*, 47 Ga. 598. And the fact that the defendant was intoxicated, "that he was excited and scattering in his conversation, and that no one who heard him could repeat all that he said," does not render his declarations or confessions of guilt inadmissible. *Eskridge v. State*, 25 Ala. 30. And see *Whitney v. State*, 8 Mo. 165; *Ballard v. State*, 19 Neb. 609.

³ *U. S. v. Montgomery*, 8 Sawy. 552.

⁴ *Owen v. State*, 78 Ala. 425.

⁵ *Byrd v. State*, 68 Ga. 661; *Ward v. People*, 3 Hill, 395; *State v. Grant*, 9 Shep. 171; *State v. Freeman*, 1 Speers, 57; *People v. Barrie*, 49 Cal. 342; *State v. Phelps*, 11 Vt. 116; *Boyd v. State*, 2 Humph. 37; *State v. Harman*, 3 Harr. 567; *Redd v. State*, 69 Ala. 255; *Flagg v. People*, 40 Mich. 706.

⁶ *Com. v. Mitchell*, 117 Mass. 431; *Grant v. State*, 55 Ala. 201; *State v. Alphonse*, 84 La. Ann. 9; *Willett v. People*, 27 Hun, 469; *People v. McGloin*, 91 N. Y. 241; *People v. Rankin*, 2 Wheel. Cr. Cas. 467; *State v. Grout*, 22 Me. 171.

⁷ *State v. Grant*, *supra*; *State v. Phelps*, *supra*; *Com. v. Knapp*, 9 Pick. 496; *Stephen v. State*, 11 Ga. 225.

⁸ *State v. Fortner*, 43 Ia. 494; *State v. Potter*, 18 Conn. 166. And see *Porter v. State*, 55 Ala. 95; *Ward v. State*, 50 Ala. 120.

The fact that a confession was made by one who was shackled and in custody and when he had no counsel, is not sufficient to make it inadmissible.¹

A confession is competent evidence, although threats and promises have been made, where it satisfactorily appears that it was not induced thereby.²

And if a jury is instructed that confessions or admissions must be made voluntarily, and that if the jury find they were made by the accused under undue influence, they cannot be considered, this is all the accused can ask.³

It is no reason for the exclusion of a confession of one charged with arson that it was obtained by the artifice and deception of the person to whom it was made in pretending that he was in sympathy with barn-burning and wanted to have some burning done on his own account. In this case the confession admitted in evidence was made in the hearing of officers who were concealed near by but without the knowledge of the accused, and before his arrest.⁴ Confessions made on the next day after defendant's arrest are not rendered incompetent by the mere fact that they were made to the same officer who made the arrest, and that such officer at the time of the arrest had held out certain inducements to the defendant, where it seems clear that such confessions were voluntary and not made in reliance upon such inducements.⁵ And the fact that one, on being arrested, was told by the officer at the time of the arrest that giving himself up was the best course that he could pursue, does not render inadmissible confessions then made to the officer, it not appearing that anything further was said or done by the officer prior to the confessions.⁶ It appearing that a confession was freely and voluntarily made, it was held immaterial that firearms were at the time deposited in the room, where they were not exhibited to defendant, and were not procured for the purpose of intimidating him.⁷

The burden of proving that a confession was voluntary lies

¹ *Sparf v. U. S.*, 156 U. S. 51; *State v. Gorham* (Vt.), 81 Atl. 845; *Com. v. Sheehan*, 168 Mass. 170.

² *Bartley v. People*, 156 Ill. 234.

³ *People v. Warner* (Mich.), 62 N. W. 405.

⁴ *Stone v. State* (Ala.), 17 So. 114.

⁵ *Com. v. Myers*, 160 Mass. 530.

⁶ *Willis v. State*, 98 Ga. 208.

⁷ *State v. Watt*, 47 La. Ann. —.

upon the prosecution;¹ and it belongs to the judicial province to determine as a preliminary question whether a confession was made with the degree of freedom which ought to occasion its admission as evidence.²

Any sufficient testimony to rebut the presumption that a confession was prompted by any degree of influence will justify the court in admitting the testimony. In one case it was said to be a significant fact tending to show that the confession was voluntarily made, that prior to the confession the defendant had not been arrested, or even publicly accused of the crime, and that he, of his own accord, sought the opportunity to talk with witnesses about the loss of the money, and manifested no disposition then, or afterwards, to deny his guilt.³

A voluntary confession of guilt, if it be full, consistent, and probable, is justly regarded as evidence of the highest and most satisfactory nature.⁴ The ground of admissibility is said to be that self-love, the mainspring of human conduct, will usually prevent a rational being from making admissions prejudicial to his interest and safety, unless when caused by the promptings of truth and conscience.⁵ This reasoning will have great or little weight, according to the circumstances of the particular case.

This evidence ought to be received with the greatest caution, and after the possibility of any inducement has been removed.⁶

¹ *Reg. v. Warringham*, 2 Den. C. C. 447, n. ; 3 Russ. on Crimes (9th Am. Ed.), 481.

² *Heaton v. State*, 2 Mo. 166 ; *State v. Patterson*, 73 Mo. 695 ; *Brister v. State*, 26 Ala. 107 ; *State v. Gorham* (Vt.), 81 Atl. 845.

³ *Bartley v. People*, 156 Ill. 234.

⁴ 3 Mascardus, *ut supra*, Concl. xv, xvi ; *Rex v. Warrickshall*, 1 Leach's C. C. 299 ; 1 Greenl. Ev. § 219 ; *State v. Brown*, 48 Ia. 882.

⁵ *State v. Matthews*, 66 N. C. 106.

⁶ *State v. Matthews*, *supra* ; *Brown v. State*, 32 Miss. 438 ; *Terr. v. McClintock*, 1 Mont. 394. It has been held, that to exclude a confession on the ground of inducement, it must be shown that the inducement had reference to the punishment of the crime charged. *State v. Tatro*, 50 Vt. 483. When a confession is obtained by a promise to put an end to a prosecution, it is held that such confession is inadmissible. *Boyd v. State*, 2 Humph. 39. A confession obtained by a promise "not to prosecute heavy" is inadmissible. *Rector v. Com.*, 80 Ky. 468. An assurance to a girl fourteen years old that she shall not be hurt, is such an inducement as renders the confession insufficient for conviction, and it is error for the court to refuse so to charge when requested. *Earp v. State*, 55 Ga. 136. But after a caution to the defendant not to tell on himself, a confession is voluntary. *State*

But a voluntary and unsuspected confession is clearly sufficient to warrant conviction, wherever there is independent proof of the *corpus delicti*.¹

It has been sometimes asserted that a confession alone, uncorroborated in any way whatever, is a sufficient ground for conviction.² But in all of the cases adduced in support of this

v. Rigsby, 6 Lea (Tenn.), 554; *Matthews v. State*, 9 Lea (Tenn.), 128; *Com. v. Sego*, 125 Mass. 210. And urging the prisoner to confess if guilty, but not to confess if innocent, will not render the disclosure inadmissible. *Meniaka v. State*, 55 Ala. 47. Where the constable had said to the prisoner, after telling him the charge, "that he must not say anything to criminate himself, that what he did say would be taken down, and used as evidence against him," Lord CAMPBELL, C. J., at the trial, received the evidence, but reserved the point for the consideration of the Court of Criminal Appeal. All the judges were of the opinion that the statement was admissible. POLLOCK, C. B., said: "A simple caution to the accused to tell the truth, if he says anything, has been decided not to be sufficient to prevent the statement being given in evidence; yet even in that case the person charged might have understood the caution as meaning that he could not tell the truth without confessing his guilt. It has been decided that that would not prevent the statement being given in evidence, by LITLEDALE, J., in *R. v. Court*, 7 C. & P. (32 E. C. L.) 486; and by ROLFE, B., in a case at Gloucester, *R. v. Holmes*, 1 Car. & K. (47 E. C. L.) 248; but where the admonition to speak the truth has been coupled with any expression importing that it would be better for him to do so, it has been held that the confession is not receivable; the objectionable words being, 'that it would be better to speak the truth,' because they import that it would be better for him to say something. This was decided in *R. v. Garner*, 1 Den. C. C. 329; 2 C. & K. 920 (61 E. C. L.). The true distinction between the present case and a case of that kind is, that here it is left to the prisoner as a perfect matter of indifference whether he should open his mouth or not." *R. v. Baldry*, 2 Den. C. C. 430; 21 L. J. M. C. 130. With regard to the nature of inducements and confessions made in consideration thereof, see further, *R. v. Jarvis*, L. R. 1 C. C. R. 96; 37 L. J. M. C. 3; *R. v. Sleeman*, 1 Dear. C. C. 249; *R. v. Upchurch*, 1 Moo. C. C. 465; *R. v. Hearn*, 1 Car. & M. 109; *R. v. Reeve*, L. R. 1 C. C. R. 362; *R. v. Fennell*, 7 Q. B. D. 147; 50 L. J. M. C. 126; *Reg. v. Mansfield*, 14 Cox C. C. 639; *Smith v. Com.*, 10 Grat. 734; *Jim v. State*, 15 Ga. 535; *Wyatt v. State*, 25 Ala. 9; *Austin v. State*, 14 Ark. 556; *People v. Burns*, 2 Park. C. R. 34; *Fife v. Com.*, 30 Pa. St. 429; *Rape v. State*, 20 Ga. 60; *People v. Smith*, 15 Cal. 408; *Dick v. State*, 30 Miss. 593; *Price v. State*, 8 Ohio St. 418; *Cady v. State*, 44 Miss. 332; *State v. Longborne*, 66 N. C. 538; *O'Brien v. People*, 48 Barb. 274; *Vaughn v. Com.*, 17 Gray, 576; *Miller v. State*, 40 Ala. 64; *Joe v. State*, 38 Ala. 422; *State v. Walker*, 34 Vt. 296; *Thompson v. Com.*, 20 Grat. 724; *Austin v. State*, 51 Ill. 236; *State v. Brockman*, 46 Mo. 566; *State v. Squires*, 48 N. H. 364; *Miller v. State* (Ga.), 21 S. E. 128; *Hardy v. U. S.* (D. C. App.), 23 Wash. L. Rep. 326.

¹ *Mose v. State*, 36 Ala. 211.

² *People v. McFall*, 1 Wheel. Cr. Cas. 107.

position there seems to have been some evidence, though slight, of confirmatory circumstances, independently of the confession.¹ It does not, therefore, appear, says Mr. Greaves,² that it has ever been expressly *decided* that the mere confession of a prisoner alone, and without any other evidence, is sufficient to warrant a conviction. And it is clearly the law of the present day that extra-judicial confessions, uncorroborated by circumstances, and without proof *aliunde* that a crime has been committed, will not justify a conviction.³ The rule has been thus declared by statute in some states.⁴ And this is most in accordance with the general principles of reason and justice, and the practice of other enlightened nations.⁵ And the proof that is necessary to sustain a confession is only proof of an objective crime, not that it has been committed by the defendant.⁶ A confession made by one accused of crime may be corroborated by clear and undoubted evidence of the *corpus delicti*.⁷

But full proof of the body of the crime is not required. All that can be required is that there be such extrinsic corroborative circumstances, as will, taken in connection with the confession, produce conviction of the defendant's guilt in the mind of the jury. Very slight corroborating circumstances have been held sufficient.⁸ Proof that the crime has been committed

¹ *Rex v. Fisher*, 1 Leach, 286; *Rex v. Eldridge*, R. & R. 441; *Rex v. Faulkner*, Id. 481; *Rex v. White*, Id. 508; *Rex v. Tippet*, Id. 509; 1 Greenleaf's L. of Ev. § 217.

² In a note to 3 Russ. on Crimes (9th Am., from 4th Lond. Ed.), 367.

³ *People v. Jones*, 31 Cal. 565; *People v. Thrall*, 50 Cal. 415; *State v. Long*, 1 Hayw. 455; *Terr. v. McClintock*, 1 Mont. 394; *Robinson v. State*, 12 Mo. 592; *People v. Hennessey*, 15 Wend. 147; *Pitts v. State*, 43 Miss. 472; *Tyner v. State*, 5 Humph. 383; *Keithler v. State*, 10 Sm. & M. 192; *Matthews v. State*, 55 Ala. 187; *Hill v. State*, 11 Tex. Crim. App. 132; *Kennon v. State*, Id. 356; *Williams v. People*, 101 Ill. 382; *Johnson v. State*, 59 Ala. 37; *State v. Knowles*, 48 Ia. 598; *People v. Lane*, 49 Mich. 340; *Stringfellow v. State*, 26 Miss. 157.

⁴ Ky. Cr. Code, § 240. See *Greenwade v. Com.*, 12 S. W. 181. But in New York a confession is evidence of the *corpus delicti*. *People v. Jachne*, 4 N. Y. Crim. Rep. 478.

⁵ Best on Pres. 330, and the cases cited; 1 Greenleaf's Ev. § 217; Alison's Princ. 325; Code Pénal d'Autriche, partie 1, § 2, ch. x.

⁶ *State v. Grear*, 29 Minn. 221; *Gray v. Com.*, 101 Pa. St. 380.

⁷ *Schaefer v. State* (Ga.), 18 S. E. 552.

⁸ *Robinson v. State*, 12 Mo. 592; *State v. German*, 54 Mo. 526; *State v. Patterson*, 73 Mo. 695; *People v. Hennessey*, 15 Wend. 147; *People v. Badgley*, 16 Wend. 53; *U. S. v. Williams*, 1 Cliff. 15; *Willard v. State*, 27 Tex. Crim. App. 386.

by some one is necessarily corroborative of a confession by the defendant that he committed the crime.¹ A great variety of facts usually attends, or is incidentally connected with, the commission of every crime. Proof of any number of these facts and circumstances, consistent with the truth of the confessions or which the confession has led to the discovery of, and which would not probably have existed had the crime not been committed, necessarily corroborate it, and increase the probability of its truth.² The corroboration is sufficient even if the corroborating circumstances are capable of innocent construction, and the confession alone furnishes the key.³ An independent fact having evidentiary significance of its own, though discovered in consequence of a constrained confession of the prisoner, is admissible in evidence unless the confession was obtained by the use of criminal violence. And in such a case the acts and declarations of the accused, so far as they explain, and are necessary to account for the discovery of such fact, are admissible also, but as being part of the *res gestæ*, and not as a confession.⁴ A prisoner having confessed to shooting the deceased with buckshot of a certain kind, it may be proved, as corroborating his confession that buckshot of that kind were found in a tree at the scene of the murder.⁵ And a conviction was held proper, where the confession of the prisoner, accused of burglary, was corroborated by evidence of his attempt to escape when found in possession of the stolen goods.⁶

It is said by Mr. Justice Foster⁷ that hasty confessions made to persons having no authority to examine are the weakest and most suspicious of all evidence. Proof may be too easily procured, words are often misreported,⁸ through ignorance, inat-

¹ *Mullins v. Com.* (Ky.), 20 S. W. 1035.

² *Bergen v. People*, 17 Ill. 426.

³ *People v. Jachne*, 4 N. Y. Crim. Rep. 478.

⁴ *Rusher v. State*, 94 Ga. 368.

⁵ *Mose v. State*, 36 Ala. 211.

⁶ *State v. Moore*, 22 S. W. 1086.

⁷ *Discourses*, 243.

⁸ The language of the witness may be substituted for that of the accused. *Law v. Merrill*, 6 Wend. 268; *State v. Gardiner*, Wr. Rep. 293. "It very frequently happens, not only that the witness has misunderstood what the party has said, but that, by unintentionally altering a few of the expressions really used, he gives an effect to the statement completely at variance with what the party really did say." Mr. Baron PARKE, in *Earle v. Picken*, 5 C. & P. 542, n. So where one of two witnesses, called to prove the same statement of the prisoner to his wife, said that the words were, "Keep yourself to yourself and don't marry again," and the other, "Keep yourself to yourself and keep your own counsel." *Rex v. Simons*, 6 C. & P. 540.

tention, or malice, and they are extremely liable to misconstruction.¹ Confessions, then, as has been said, ought always to be received with great caution. Judicial history presents innumerable warnings of the danger of placing implicit dependence upon this kind of self-condemnatory evidence, even where it is exempt from all suspicion of coercion, physical or moral, or other sinister influence.² How greatly, then, must such danger be aggravated, where confession constitutes the only evidence of the fact of a *corpus delicti*; and how incalculably greater in such cases is the necessity for the most rigorous scrutiny of all collateral circumstances which may actuate the party to make a false confession! The agonies of torture, the dread of their infliction, the hope of escaping the rigors of slavery or the hardships of military service, a weariness of existence, self-delusion, the desire to shield a guilty relative or friend from the penalties of justice,³ the impulses of despair from the pressure of strong and apparently incontrovertible presumptions of guilt, the dread of unmerited punishment and disgrace, the hope of pardon,⁴—these and numerous other inducements have not unfrequently operated to produce unfounded confessions of guilt.

Innumerable are the instances on record of confession, extracted “by the deceitful and dangerous experiment of the criminal question,”⁵ of offences which were never committed, or not committed by the persons making confession.⁶ Nor have such instances been wanting in other parts of Europe even in the present century.

When Felton, upon his examination at the Council Board, declared, as he had always done, that no man living had instigated him to the murder of the Duke of Buckingham, the Bishop of London said to him, “If you will not confess, you must go to the rack.” The man replied, “If it must be so, I know not whom I may accuse in the extremity of the

¹ Roscoe, *Crim. Ev.* (8th Am. Ed.) 67. Where a witness has testified to a confession the defendant may show that it was uttered in jest. *Ray v. State*, 80 Ala. 104.

² *U. S. v. Nott*, 1 McL. 499.

³ 1 Chitty's *Crim L.* 85.

⁴ *Brister v. State*, 26 Ala. 107; and remarks of Chief Justice EYRE in *Warrickshall's Case*, *supra*.

⁵ 3 Gibbon's *Decline and Fall*, ch. xvii.

⁶ Jardine on the Use of Torture in the C. L. of England, 3, 6. And see Fortescue, *De Laudibus Legum Angliæ*, ch. 22.

torture; Bishop Laud, perhaps, or any lord at this Board.”¹ “Sound sense,” observed the excellent Sir Michael Foster, “in the mouth of an enthusiast and a ruffian.”²

Not less repugnant to policy, justice, and humanity, is the moral torture to which in some (perhaps in most) of the nations of Europe, persons suspected of crime are subjected, by means of searching, rigorous, and insidious examinations, conducted by skilful adepts in judicial tactics, and accompanied sometimes even by dramatic circumstances of terror and intimidation.³

Lord Clarendon gives a circumstantial account of the confession of a Frenchman named Hubert, after the fire of London, that he had set the first house on fire, and had been hired in Paris a year before to do it. “Though,” says he, “the Lord Chief Justice told the King that ‘all his discourse was so disjointed he did not believe him guilty,’ yet upon his own confession the jury found him guilty, and he was executed accordingly:” the historian adds, “though no man could imagine any reason why a man should so desperately throw away his life, which he might have saved though he had been guilty, since he was accused only upon his own confession, yet neither the judges nor any present at the trial did believe him guilty, but that he was a poor distracted wretch, weary of life, and chose to part with it this way.”⁴

Three men were tried and convicted of the murder of a Mr. Harrison. One of them confessed himself guilty of the fact under a promise of pardon. The confession, therefore, was not given in evidence against him, and a few years afterwards it appeared that Mr. Harrison was alive.⁵

A very remarkable case of this nature was that of the two Boorns, convicted in the Supreme Court of Vermont in September term, 1819, of the murder of Russell Colvin, May 10, 1812. It appeared that Colvin, who was the brother-in-law of the prisoner's, was a person of a weak and not perfectly sound mind; that he was considered burdensome to the family of the

¹ 1 Rushworth's Collections, 688.

² Foster's C. L. 244 (3d Ed.).

³ See the case of Riembaour, a Bavarian priest, charged with murder, in Narratives of Remarkable Criminal Trials, by Feuerbach, *ut supra*.

⁴ Life and Continuation, etc., 94 [Clarendon Ed. 1824]; and see 2 Mem. of Romilly, 182, where it is stated that an innocent man was executed erroneously by the sentence of a court-martial, on a charge of mutiny.

⁵ MS. case, cited 1 Leach, 264, n.; Roscoe's Crim. Ev. (8th Am. Ed.) 67.

prisoners, who were obliged to support him; that on the day of his disappearance, being in a distant field, where the prisoners were at work, a violent quarrel broke out between them, and that one of them struck him a violent blow on the back of the head with a club, which felled him to the ground. Some suspicions arose, at that time, that he was murdered; which were increased by the finding of his hat in the same field, a few months afterwards. These suspicions in process of time subsided; but in 1819, one of the neighbors having repeatedly dreamed of the murder, with great minuteness of circumstances, both in regard to his death and the concealment of his remains, the prisoners were vehemently accused, and generally believed guilty of the murder. Upon strict search, the pocket-knife of Colvin, and a button of his clothes, were found in an old open cellar in the same field; and in a hollow stump, not many rods from it, were discovered two nails and a number of bones believed to be those of a man. Upon this evidence, together with the deliberate confession of murder and concealment of the body in those places, they were convicted and sentenced to die. On the same day they applied to the legislature for a commutation of the sentence of death, to that of perpetual imprisonment; which as to one only of them was granted. The confession now being withdrawn and contradicted, and a reward offered for the discovery of the missing man, he was found in New Jersey, and returned home in time to prevent the execution. He had fled for fear that they would kill him. The bones were those of an animal. The prisoners had been advised by some misjudging friends, that, as they would certainly be convicted, upon the circumstances proved, their only chance for life was by a commutation of punishment, and that this depended on their making a penitential confession, and thereupon obtaining a recommendation to mercy.¹

The State Trials contain numerous confessions of witchcraft, and abound with absurd and incredible details of communications with evil spirits, which only show that the parties were either impostors, or the involuntary victims of invincible self-delusion. One kind of false confession, that namely of being a deserter, was so common in England as to have been made

¹ 1 Greenl. Ev. § 14, n. And see the case of the Perrys, *infra*, and a case in Wharton's Crim. L. 315.

the subject of penal repression by rendering the offender liable to be treated as a rogue and vagabond, and to be imprisoned for any period not exceeding three months.¹

It has been well said that "whilst such anomalous cases ought to render courts and juries at all times extremely watchful of every fact attendant on confessions of guilt, the cases should never be invoked or so urged by the accused's counsel as to invalidate indiscriminately all confessions put to the jury, thus repudiating those salutary distinctions which the Court, in the judicious exercise of its duty, shall be enabled to make. Such a use of these anomalies, which should be regarded as mere exceptions, and which should speak only in the voice of warning, is no less unprofessional than impolitic, and should be regarded as offensive to the intelligence both of the Court and jury."²

It is essential to justice, that a confessional statement, if it be consistent, probable, and uncontradicted, should be taken together, and not distorted, or but partially adopted.³ It is error to refuse to admit all that was said by a prisoner when a part of the conversation has been introduced as a confession.⁴ And counsel who has consented to allow part of a conversation to be proved cannot object to the residue on grounds which apply to the whole.⁵ The rule, however, does not exclude a confession where only part of what the defendant said was overheard.⁶ Nor is a confession, *if full and unqualified*, inadmissible because an interruption has prevented the defendant from adding something favorable to himself.⁷ But it is inadmissible if, by the interruption, the defendant has been prevented from saying all he wished to say.⁸ And no part of a confession should be received where the witness did not understand all that the prisoner said to him.⁹ Nor is a confession

¹ Stat. 20 Vict. 13, c. 49.

² 1 Hoffman's Course of Legal Study, 367.

³ ABBOTT, C. J., in the Queen's Case, 2 Brod. & Bing. 297. And see Kelsey v. Bush, 2 Hill, 440; People v. Penhallon, 42 Hun, 103; State v. Miller (Del.), 32 Atl. 137; 9 Houst. 564.

⁴ Long v. State, 22 Ga. 40; People v. Davis, 8 Cal. 106. And see Eiland v. State, 52 Ala. 322.

⁵ State v. McDonald, 73 N. C. 346.

⁶ State v. Covington, 2 Bail. 569; State v. Pratt, 88 N. C. 639; Com. v. Pitsinger, 110 Mass. 101.

⁷ Levison v. State, 54 Ala. 520.

⁸ Crawford v. State, 4 Cold. 190; Miller v. State, 40 Ala. 50.

⁹ People v. Gilabert, 89 Cal. 653.

admissible if the witness does not remember the substance of all that was said at the time.¹ But it is not to be rejected merely because the witness does not recollect the whole of the conversation.²

On the trial of a man for a murder committed twenty-four years before, the principal inculpatory evidence consisted of his confession, which stated in substance that he was present at the murder, but went to the spot without any previous knowledge that a murder was intended, and took no part in it. It was urged that the prisoner's concurrence must be presumed from his presence at the murder, but Mr. Justice Littledale held that the statement must be taken as a whole; and that so qualified, it did not in fairness amount to an admission of the guilt of murder;³ and where the prisoner's declaration, in which she asserted her innocence, was given in evidence, and there was evidence of other statements confessing guilt, the judge left the whole of the conflicting statements to the jury for their consideration. But where there is, in the whole case, no evidence but what is compatible with the assertion of innocence, adduced in evidence for the prosecution, the judge will direct an acquittal.⁴ In the case of Strahan and Paul, it was unsuccessfully contended, that the admission made by the prisoner Strahan must be taken to the whole extent to which it was made, and that it would then fairly and reasonably lead to the conclusion that he had known nothing of the fraudulent transactions in which the other prisoner was the leading actor in March, 1854; but Mr. Baron Alderson told the jury that they were not bound to believe either the whole or any part of the statement made by the prisoner Strahan, and that they must take it with this consideration as one of the circumstances of the case and no more.⁵

The credibility of a confession, or the effect or weight to which it is entitled, it is the province of the jury to determine.

¹ *Berry v. Com.*, 10 Bush (Ky.), 15; *State v. Hughes*, 29 La. Ann. 514.

² *Kendall v. State*, 65 Ala. 492; *State v. Pratt*, 88 N. C. 639; *Pond v. State*, 55 Ala. 196. If the prisoner, in speaking of the testimony of one who had testified against him, says that "what he said was true so far as he went, but he did not say all or enough;" this is not admissible as a confession, nor does it warrant proof to the jury of what the witness did swear to. *Finn v. Com.*, 5 Rand. 701.

³ *Rex v. Clewes*, 4 C. & P. 221, and *Short-hand Rep.*

⁴ *Rex v. Jones*, 2 C. & P. 629.

⁵ C. C. C., Oct. 1855.

In the consideration and determination of these inquiries they must look to all the facts and circumstances under which the confession was made,¹ the motives which induced it, and its consistency with the other evidence, and may believe such facts as they have reason for believing, and reject such facts as they think unworthy of credence.² If the confessional statement is inconsistent, improbable, or incredible, or is contradicted or discredited by other evidence, or is the emanation of a weak or excited state of mind, the jury may exercise their discretion in rejecting it, either wholly or in part, whether the rejected part make for or against the prisoner.³ "It is a rule of law," said Lord Ellenborough, "that when evidence is given of what a party has said or sworn, all of it is evidence (subject to the consideration of the jury, however, as to its truth), coming, as it does, in one entire form before them; but you may still judge to what parts of the whole you can give credit; and also whether that part which appears to confirm and fix the charge does not outweigh that which contains the exculpation."⁴ The jury may believe part and disbelieve part;⁵ but such facts must be distinct and relate to different matters of fact.⁶ And though the circumstances under which a confession was made may not be such as to render it incompetent testimony, they may nevertheless be considered by the jury as affecting the weight to be attached to the confession.⁷ Where a witness testifies to a confession made to a third person in the dark by the prisoner, whom he identifies only by his voice, this testimony is competent, but the sufficiency of the identification is for the jury.⁸

¹ *State v. Miller* (Del.), 32 Atl. 137; 9 *Houst.* 564.

² *Young v. State*, 68 Ala. 569; *Welsh v. State*, 11 So. 450; 3 *Brick. Dig.* § 550.

³ *Rex v. Higgins*, 3 C. & P. 603; *Rex v. Steptoe*, 4 C. & P. 397; *Roberts v. Gee*, 15 Barb. 449; 1 *Greenl. Ev.* § 218.

⁴ *Rex v. Lord Cochran* and others, *Gurney's Rep.* 479. And see *Green v. State*, 13 Mo. 382; *Brown's Case*, 9 Leigh, 332; *Bower v. State*, 5 Mo. 364; *Griswold v. State*, 24 Wis. 144.

⁵ *Bank of Washington v. Harrington*, 2 Penn. 27; *Young v. State*, 2 Yerg. 292; *Kelsey v. Bush*, 2 Hill, 440; *State v. Mahan*, 32 Vt. 241; *People v. Wyman*, 15 Cal. 70; *State v. Hollenscheit*, 61 Mo. 302; *McHenry v. State*, 40 Tex. 46.

⁶ *Fox v. Lambson*, 2 Halst. 275. And see *Hick's Case*, 1 City Hall Rec. 66; *People v. Weeks*, 3 Wheel. Cr. Cas. 538.

⁷ *State v. Gorham* (Vt.), 81 Atl. 845. ⁸ *Fussell v. State*, 98 Ga. 450.

On the trial of a man for setting fire to a stack of hay, it appeared that between two and three o'clock in the morning a police constable, attracted by the cry of fire, went to the spot, close to which he met the prisoner, who told him that a haystack was on fire and that he was going to London; the policeman asked him to give information of the fire to any other policeman he might meet, and request him to come and assist. Shortly afterwards, on his way towards London, the prisoner met a sergeant of police, whom he informed of the fire, stating that he was the man who set the stack on fire, upon which he was taken into custody. The sergeant of police, on cross-examination by the prisoner, stated that the magistrates entertained an opinion that he was insane, and directed inquiries to be made, from which it appeared that he had before been charged with some offence, and acquitted on the ground of insanity. When apprehended, the prisoner appeared under great excitement; and upon his trial he alleged that he had been confined two years in a lunatic asylum, and had been liberated only about a year ago; that his mind had been wandering for some time; and that passing by the place at the time of the fire, he was induced, in a moment of delirium, to make this groundless charge against himself. He begged the court to explain to the jury the different result that would follow from his being acquitted on the ground of insanity, and an unconditional acquittal; and said that rather than the former verdict should be returned, which would probably have the effect of immuring him in a lunatic asylum for the rest of his life, he would retract his plea of not guilty, and plead guilty to the charge. Mr. Justice Williams, in summing up, remarked that there did not appear to be the least evidence against the prisoner except his own statement; and that it was for the jury to say under all the circumstances whether they believed that statement was founded in fact, or whether it was, as the prisoner alleged, merely the effect of an excited imagination and weak mind. The prisoner was acquitted.¹

There is no rule of law which compels jurors to believe confessions made by a defendant when he is sober, in preference to those of a contradictory character made when drunk. The relative credibility of the statements is a question for the jury.²

¹ *Reg. v. Wilson*, Maidstone Wint. Ass. 1844. The same doctrine was held by L. C. J. Wilde, in a case of arson at Maidstone Spring Assizes, 1847, where the prisoner to conceal his disgrace refused to give his name.

² *Finch v. State*, 1 So. 565.

In an English case the constable had given liquor to the prisoner to cause him to make confessional statements. The judge said that it was a matter of observation to the jury as to the degree of credit to which such statements were entitled.¹ In a New York case of similar facts the judge said that the argument which had been made to convince the court that the evidence should have been stricken out, might, with more propriety, have been addressed to the jury to satisfy them that the confessions of the prisoner while in that condition were not reliable and ought not to have been used for his conviction.²

SECTION II.

Indirect Confessional Evidence.

It is obvious that every caution observed in the reception of evidence of a direct confession ought to be more especially applied in the admission and estimation of the analogous evidence of statements which are only indirectly in the nature of confessional evidence ; since such statements, from the nature of the case, must be ambiguous, or relate but obscurely to the *corpus delicti*.

"How easy is it," it has been admirably said, "for the hearer to take a word in a sense not intended by the speaker, and for want of an exact representation of the tone of voice, emphasis, countenance, eye, manner, and action of the one who made the confession, how almost impossible it is to make third persons understand the exact state of his mind and meaning! For these reasons such evidence is received with great distrust and under apprehension for the wrong it may do."³

And this evidence, as was said by Sir Michael Foster in a passage heretofore cited, "is not in the ordinary course of things to be disproved by that sort of negative evidence by which the proof of plain facts may be and often is confronted."⁴

Upon the trial of a man for the murder of a woman, who

¹ *Rex v. Spillbury*, 7 C. & P. 187.

² *Jefferds v. People*, 5 Park. Cr. Rep. 522. See also *People v. McMahon*, 15 N. Y. 384.

³ In *Resp. v. Fields*, Peck's Rep. 140, quoted in 1 Taylor's L. of Ev. 689, 2d Ed.

⁴ Foster's C. L. 248. And see 1 Greenl. Ev. § 214.

had been brutally assaulted by three men and died from the injuries she received, it appeared that one of the offenders, at the time of the commission of the outrage, called another of them by the prisoner's name, from which circumstances suspicion attached to him. A person deposed that he met the prisoner at a public-house, and asked him if he knew the woman who had been so cruelly treated, and that he answered, "Yes, what of that?" The witness said that he then asked him if he was not one of the parties concerned in that affair; to which he answered, according to one account, "Yes, I was; and what then?" or, as another account states, "If I was, what then?" It appeared that the prisoner was intoxicated, and that the questions were put with a view of ensnaring him; but influenced by this imprudent language, the jury convicted him, and he was executed. The real offenders were discovered about two years afterwards, and two of them were executed for this very offence, and fully admitted their guilt; the third having been admitted to give evidence for the Crown.¹

Nevertheless the conduct, demeanor, or expressions of a prisoner on being charged with a crime, or upon allusions being made to it, are evidence against him.² In almost every criminal case a portion of the evidence laid before the jury often consists of the conduct of the party either before or after being charged with the offence, presented not as a part of the *res gestæ*, but as indicative of a guilty mind.³ In the most debased persons there is an involuntary tendency to truth and consistency, except when the mind is on its guard, and studiously bent upon concealment; and this law of our nature sometimes gives rise to minute and unpremeditated acts of great weight. Acts speak as well as words, and they are to be interpreted by the common experience of mankind.⁴ A confession may be inferred from the conduct of a prisoner when a statement affecting him is made in his presence.⁵ The circumstance of observations being made to the accused by his wife, who could not be called as a witness to contradict the state-

¹ *Rex v. Coleman*, Kingston Spring Ass. 1748-9, and 1 Remarkable Trials, 162, 172; *Rex v. Jones and Welch*, 4 Celebrated Trials, 344.

² *Mason v. State*, 42 Ala. 582.

³ *Roscoe Cr. Ev.* (8th Am. Ed.) 80; *Jamison v. People*, 34 N. E. 486.

⁴ *Murrell v. State*, 46 Ala. 89; *Greenfield v. People*, 85 N. Y. 75.

⁵ *Donnelly v. State*, 2 Dutch. 463, 601; *People v. Green*, 1 Park. Crim. Rep. 11.

ments, was held not to vary the general rule that whatever was said to a prisoner on the subject-matter of the charge, to which he made no direct answer, might be received as an implied admission on his part.¹ So where the wife of the prisoner who was indicted for the murder of his wife's mother came into the room, where he was in custody, and said to him: "Oh, Bartlett! how could you do it?" He looked steadfastly at her, and said, "Oh, what! you accuse me of the murder too?" She said, "I do, Bartlett; you are the man that shot my mother." The prisoner did not make any reply. She then turned to the witness and said, "This was done for money." The evidence was held clearly admissible, though the wife could not be examined on oath.²

The silence of a prisoner when accused by a companion of committing the crime for which he is indicted is a circumstance, though very slight, for the consideration of the jury.³ But no admission can be inferred from silence when the silence can be explained.⁴ In California it is declared that an inference of guilt cannot be drawn from silence where a person is not bound to speak, nor from a refusal to answer unauthorized questions touching the charge against him, which under the circumstances called for no reply.⁵ Where the truth or falsehood of a material fact is not known to a party to whom the fact is asserted to exist, his silence furnishes no evidence against him.⁶ While a confession is incompetent against a co-defendant who was not present when it was made, it is competent when made in the presence of the latter, and under such circumstances as would warrant the inference that he would naturally have contradicted them if he did not assent to their truth.⁷

And the deportment of the accused when confronted with the corpse of the deceased may be shown.⁸ And after the

¹ *Rex v. Smithies*, 5 C. & P. 332.

² *Rex v. Bartlett*, 7 C. & P. 832, quoted in 3 *Russ. on Crimes* (9th Am. Ed.) 423.

³ *Ettinger v. Com.*, 98 Pa. St. 338; *Puett v. Beard*, 86 Ind. 104; *Kendrick v. State*, 55 Miss. 436; *Kelly v. People*, 55 N. Y. 565; *State v. Bowman*, 80 N. Y. 432. But see *Campbell v. State*, 55 Ala. 80.

⁴ *Slattery v. People*, 76 Ill. 217; *Broyles v. State*, 47 Ind. 251.

⁵ Cal. Pen. Code, §§ 1958, 1960. See *People v. Elster*, 5 *Crim. L. Mag.* 687.

⁶ *Robinson v. Blen*, 20 Ind. 109.

⁷ *Spoof v. U. S.*, 156 U. S. 51; 39 L. Ed. 343; 15 Sup. Ct. Rep. 273.

⁸ *Handline v. State*, 6 Tex. Crim. App. 347.

State has introduced such evidence the defendant may not prove what he said at the time.¹ Evidence may be admitted of an attempt, at a former trial of the same cause, to corrupt a juror, as tending to prove the cause of action, or ground of defence relied upon by the party making such attempt, false and dishonest.² And evidence that a justice, who performed a marriage ceremony in which the girl was apparently under the age of consent, omitted all inquiry for her parents, is admissible to show that he knew the marriage was unlawful.³

On a trial for murder a witness was allowed to testify as to the conduct of the defendant when arrested, and the comments of a third person at the time with regard thereto.⁴ In the trial of an indictment for maintaining a liquor nuisance, evidence of the bar-keeper's conduct was admitted with other circumstances to show guilt.⁵ And on an indictment for murder evidence was admitted as to the prisoner's dodging, trembling, and confusion when met by the witnesses before and at the time of his arrest.⁶ And it may be shown that one charged with homicide manifested great uneasiness at the inquest, taking different persons to one side and questioning them as to whom they suspected of the murder, and that he advised and cautioned secretly another on trial for the same murder.⁷

In the memorable case of Eugene Aram, who was tried in 1759 for the murder of Daniel Clark, an apparently slight circumstance in the conduct of his accomplice led to his conviction and execution. About thirteen years after the time of Clark's being missing, a laborer employed in digging for stone to supply a limekiln near Knaresborough discovered a human skeleton near the edge of the cliff. It soon became suspected that the body was that of Clark, and the coroner held an inquest. Aram and Houseman were the persons who had last been seen with Clark, on the night before he was missing. The latter was summoned to attend the inquest, and discovered signs of uneasiness: at the request of the coroner he took up one of the bones, and in his confusion dropped this unguarded expression: "This is no more Daniel Clark's bone than it is

¹ *U. S. v. Neverson*, 1 Mack. (D. C.) 152.

² *Hastings v. Stetson*, 180 Mass. 76; *Gulerette v. McKinley*, 27 Hun, 820.

³ *Banker v. People*, 37 Mich. 4.

⁴ *People v. Ah Fook*, 64 Cal. 380.

⁵ *Com. v. Locke*, 5 N. Eng. 498.

⁶ *Beaven v. State*, 58 Ind. 580.

⁷ *Johnson v. State*, 18 Tex. Crim. App. 385.

mine;" from which it was concluded, that if he was so certain that the bones before him were not those of Clark, he could give some account of him. He was pressed with this observation, and after various evasive accounts, he made a full confession of the crime; and upon search, pursuant to his statement, the skeleton of Clark was found in St. Robert's Cave, buried precisely as he had described it.¹

A remarkable fact of the same kind occurred in the case of one of three men convicted, in February, 1807, of a murder on Hounslow Heath. In consequence of disclosures made by an accomplice, a police officer apprehended the prisoner four years after the murder on board the "Shannon" frigate, in which he was serving as a marine. The officer asked him in the presence of his captain where he had been about three years before; to which he answered that he was employed in London as a day-laborer. He then asked him where he had been employed that time four years; the man immediately turned pale, and would have fainted away had not water been administered to him. These marks of emotion derived their weight from the latency of the allusion, no express reference having been made to the offence with which the prisoner was charged, and from the probability that there must have been some secret reason for his emotion connected with the event so obscurely referred to, particularly as he had evinced no such feeling upon the first question, which referred to a later period.²

To this head may be referred the acts of concealment, disguise, flight, and other indications of mental emotion usually found in connection with guilt.³ As a circumstance tending to prove the guilt of the accused, the fact that he concealed himself immediately after the commission of the crime is admissible, and if, in such a case, the defendant offers evidence to show that instead of concealing himself he was publicly walking about the streets, evidence may be admitted in rebuttal to show that while so in the streets he was under an attempted disguise.⁴ The use of a fictitious name by the ac-

¹ Life and Trial of Eugene Aram; and see Biog. Brit. article Eugene Aram.

² Rex v. Haggerty and others, 6 Celebrated Trials, 19; and Session Papers, 1807.

³ Rex v. Crossfield, 26 St. Tr. 216 *et seq.*; and Rex v. O'Coigley, 27 Id. 138.

⁴ Com. v. Tolliver, 119 Mass. 312.

cused shortly after the offence may be shown.¹ The fact that one accused of theft was in possession of the stolen property immediately after the theft, and that when he sold it, gave a false name, is sufficient to justify a conviction.² Where the defendant was charged with the murder of a woman who had been his mistress, it came out upon the trial that the two had quarrelled a short time before, and that the accused was very much incensed with the deceased and had tried to shake off the *liaison*. On the evening when the woman was last seen alive she left the house with accused, expressing an intention of returning. Nothing more was known of her until her body was some time after found, hidden in a forsaken place, bearing marks making it clear that the woman had been murdered. The accused returned to the house on the evening of the woman's disappearance, and packed up everything belonging to her, stating that she had gone to a certain place, whither he was about to follow her. He however merely moved to another part of the same city, where he continued to live under an assumed name. It appeared that shortly after the disappearance of the woman the prisoner had pawned a watch which had belonged to her. The prisoner was found guilty, and, on appeal, the conviction was sustained.³

The flight of one charged with crime immediately after the commission of the offence is a circumstance tending to prove guilt, and may always be taken into consideration.⁴ By the common law, flight was considered so strong a presumption of guilt, that in cases of treason and felony it carried the forfeiture of the party's goods, whether he were found guilty or acquitted;⁵ and the officer always, until the abolition of the practice by statute,⁶ called upon the jury, after verdict of acquittal, to state whether the party had fled on account of the charge. Flight of the prisoner to escape arrest after the discovery of stolen property in his possession is a circumstance against him.⁷ It may be shown that the accused attempted to fly, and that he resisted arrest.⁸ On an indictment for rape, where the defence

¹ *State v. Ellwood*, 24 Atl. 782; *Com. v. Griffin*, 4 Allen, 810.

² *Freese v. State*, 21 S. W. 189.

³ *Terr. v. Bryson*, 9 Mont. 32.

⁴ *Com. v. McMahon*, 145 Pa. St. 413; *People v. Ogle*, 4 N. Y. Crim. Rep. 349; *State v. Rush*, 95 Mo. 199; *State v. Griffin*, 87 Mo. 608.

⁵ *Co. Litt.* 375.

⁶ 7 and 8 Geo. IV. c. 28, § 5.

⁷ *State v. Schoffer*, 70 Ia. 371.

⁸ *Jamison v. People*, 145 Ill. 357.

set up an *alibi*, evidence was held admissible to show by a police officer that on the night in question, and shortly after the time of the offence, the officer met the defendant as the latter was going on to a bridge leading into another State, and that on being halted by the officer he fired his revolver at the latter.¹

Absence from a town where a crime has been committed, when not explained, is indicative of flight, and may be construed as a circumstance pointing to the guilt of the accused.² On a trial for murder, when the evidence was circumstantial, it having been shown that a few days after the homicide the accused left the neighborhood and did not return for some months, evidence was admitted to show his intent prior to the crime to remain in the place, of the fact that before the homicide he contracted with one in the neighborhood to work for him, and to commence work two days after the date when the murder occurred, and that he never came to comply with the contract.³

It has been held that the rule extends only to the person fleeing, and that the flight of one of two conspirators cannot be put in evidence against the other on a separate trial.⁴ But where the defendant was accused of burglary, he and another had slept in a barn, and near them were found the stolen articles. The other resisted arrest and escaped, and this fact was permitted to be commented on by prosecution.⁵

It may be proven, as tending to show a consciousness of guilt and fear of conviction, that the prisoner fled after his release on bail.⁶ The fact that bail given by an accused was "straw bail," that the prisoner forfeited his recognizance by voluntarily absenting himself, taken in connection with the fact that the prisoner passed under various *aliases*, were proper for the consideration of the jury.⁷

But evidence that a defendant charged with rape, who had been arrested on a charge of assault and released on bail, did not run away, is irrelevant, and all the more so that the charge of rape had not been preferred against him at that time.⁸

¹ State v. Taylor, 117 Mo. 181.

² Com. v. Annis, 15 Gray, 197.

³ Welsh v. State, 96 Ala. 92.

⁴ People v. Stanley, 47 Cal. 113.

⁵ Cummins v. People, 42 Mich. 142.

⁶ Hart v. State, 22 Tex. Crim. App. 563; State v. Williams, 43 Tex. 182.

⁷ Barron v. People, 73 Ill. 256.

⁸ State v. Wilkins (Vt.), 28 Atl. 323.

An escape from jail may be shown;¹ and an escape from custody during the progress of a trial may be shown on a second trial of the same indictment.² And an attempt to escape, as well as an actual escape, may be proved.³ In a late case evidence was admitted of the facts that the wire netting on the outside window of the prisoner's cell was cut, and that a razor and gun-wrench were subsequently found in his possession, as tending to show that he was planning an escape.⁴ Testimony is admissible to show that the defendant requested witness to assist him in breaking jail.⁵

These several acts in all their modifications are indications of fear;⁶ but it would be harsh and unreasonable invariably to interpret them as indications of guilty consciousness, and greater weight has sometimes been attached to them than they have fairly warranted. Doubtless the manly carriage of integrity always commands the respect of mankind, and all tribunals do homage to the great principles from which consistency springs; but it does not follow, because the moral courage and consistency which generally accompany the consciousness of uprightness raise a presumption of innocence, that the converse is always true. Men are differently constituted as respects both animal and moral courage,⁷ and fear may spring from causes very different from that of conscious guilt; and every man is therefore entitled to a candid construction of his words and actions, particularly if placed in circumstances of great and unexpected difficulty.⁸ In a case where it was claimed to be a circumstance evincive of the guilt of one accused of murdering his wife, that he showed no symptoms of grief on the morning after the murder, the learned judge remarked that "innocent persons, appalled by the enormity of a charge of crime, will sometimes exhibit great weakness and terror, and those who have been crushed with the weight of a great sorrow will manifest the greatest composure and serenity in their grief, and meet it without the shedding of a tear."⁹ An in-

¹ *People v. Myers*, 2 Hun, 6.

² *Murrell v. State*, 46 Ala.

³ *State v. Stevens*, 67 Ia. 557; *Ryan v. State*, 83 Wis. 486; *Palmer v. Brody*, 78 Wis. 483; *Anderson v. State*, 2 West. 341; *Fanning v. State*, 14 Mo. 396.

⁴ *State v. Palmer*, 65 N. H. 216.

⁵ *State v. Jackson*, 95 Mo. 623.

⁶ *State v. Moody*, 50 Ia. 443.

⁷ *Elmore v. State*, 98 Ala. 12.

⁸ Per Mr. Baron GURNEY, in *Reg. v. Delaney*, *infra*.

⁹ *Greenfield v. People*, 85 N. Y. 75.

struction upon the going away from the place of the homicide of one charged with murder, as raising a presumption of guilt, should be so framed as to include all the circumstances. If the accused leaves the place of the crime, but without effort at concealment, this will not raise the presumption of guilt.¹ Mr. Justice Abbott, on a trial for murder where evidence was given of flight, observed in his charge to the jury that "a person, however conscious of innocence, might not have courage to stand a trial; but might, although innocent, think it necessary to consult his safety by flight." "It may be," added the learned judge, "a conscious anticipation of punishment for guilt, as the guilty will always anticipate the consequences; but at the same time it may possibly be, according to the frame of mind, merely an inclination to consult his safety by flight rather than stand his trial on a charge so heinous and scandalous as this is."² The learned judge in Professor Webster's case, said, "Such are the various temperaments of men, and so rare the occurrence of the sudden arrest of a person upon the charge of a crime so heinous, that who of us can say how an innocent or a guilty man ought or would be likely to act in such a case? or that he was too much or too little moved for an innocent man? Have you any experience that an innocent man, stunned under the mere imputation of such a charge, will always appear calm and collected? or that a guilty man, who by knowledge of his danger might be somewhat braced up for the consequences, would always appear agitated or the reverse?"³

The fact that one accused of larceny was excited and nervous while his boots were being measured to ascertain if they corresponded with tracks found leading from the place where the crime had been committed, was said not to be a fact from which an inference of guilt could be drawn. An innocent party might be excited under such a charge, and this would depend on mental and physical peculiarities. The evidence of excitement is peculiarly objectionable, because it is likely to be given by parties prepossessed with a belief of the guilt of the accused, and very certain from that fact to draw unfavorable inferences and to have what they see magnified in their imagination.⁴

¹ State v. Fairlamb, 12 Mo. 137.

² Rex v. Donnell, *infra*.

³ 5 Cush. 295, 386.

⁴ People v. Wolcott, 5 Crim. L. Mag. 84

An attempt to escape an arrest for murder, standing alone, is insufficient to warrant a conviction of the crime.¹

Flight may be from fear of private vengeance and not from consciousness of guilt.² Prejudice is often epidemic, and there have been periods and occasions when public indignation has been so much and so unjustly aroused, as reasonably to deter the boldest mind from voluntary submission to the ordeal of a trial. The consciousness that appearances have been suspicious, even where suspicion has been unwarrantable, has sometimes led to acts of conduct apparently incompatible with innocence, and drawn down the unmerited infliction of the highest legal penalty. The inconclusiveness of these circumstances is strikingly exemplified by a case mentioned in a preceding page, where the magistrate was so fully convinced of the prisoner's innocence that he allowed him to go at large on bail to appear at the assizes. The coroner's inquest having brought in a verdict of "guilty" against him, he endeavored to escape from the danger of a trial in the excited state of public feeling by flight; but was subsequently apprehended, convicted, and executed on a charge of murder, of which he was unquestionably guiltless.³ But where the defence claimed that the homicide was unpremeditated, and, to rebut the presumption arising from flight, offered to show popular excitement and anticipated violence, but it appeared that the defendant fled before there was any demonstration of excitement, and so soon after the commission of the deed that there could not arise a well-grounded apprehension of violence, the evidence was excluded.⁴ And it has recently been held that the force of the circumstance of the prisoner's flight immediately after the homicide was not to be weakened by testimony that it was the general talk in the community that if the accused was found he would be killed without arrest, and such evidence ought not to be allowed to go to the jury.⁵ But excitement existing after arrest may be shown as evidence of its strength.⁶

It is not possible to lay down any express test by which

¹ *State v. Rector*, 120 Mo. 635.

² *Lewis v. State*, 96 Ala. 6.

³ *Rex v. Coleman*, *ante*, 78; and see the case of Green and others, 14 St. Tr. 1369, where several persons, one of whom had voluntarily surrendered, were convicted in Scotland and executed, at a period of great excitement against Englishmen, upon a groundless charge of piracy and murder.

⁴ *State v. Phillips*, 24 Mo. 475.

⁵ *Taylor v. Com.*, 90 Va. 109.

⁶ *State v. Phillips*, *supra*.

these various indications may be infallibly referred to any more specific origin than the operation of fear. Whether that fear proceeds from the consciousness of guilt, or from the apprehension of undeserved disgrace and punishment, and from deficiency of moral courage, is a question which can be judged of only by reference to concomitant circumstances.

On the trial of a prisoner for having in his possession with intention to utter, and for passing, a counterfeit note, it was shown that on passing the bill he took up his change in a confused manner, evincing fear, and that, at the time of his arrest, he offered the officer one hundred dollars to release him, and attempted to escape by knocking the officer down; that he gave a confused and unsatisfactory account on his examination in the police office, and stated that he had obtained the bill from one of whom nothing further was known. On the other hand, it appeared that he passed the bill to a person whom he knew, that he gave a true statement of his business, and that no other spurious bill was found on him. He had been in prison before, and was shown, since his discharge, to have borne a good character. Having been in prison before, he might have been prompted to offer the money to secure his escape, by the knowledge of the impression that would exist against him.¹

That one accused of murder showed agitation and embarrassment on visiting the scene of the crime the morning after its commission and before he was suspected, is a fact of little importance when considered alone, but may be of much significance when considered in connection with the other evidence in the case.²

The fact that one accused of so grave a crime as murder turns pale at the time of being arrested, is slight, if any, evidence of guilt, but is, nevertheless, competent whether it indicates guilt or is merely the disturbance of the physical system, as likely to appear in an innocent as a guilty man, is for the jury in the light of other circumstances and the acts and declarations of the accused.³

Whether or not the motive for an escape has its origin in the consciousness of guilt and the dread of being brought to justice, or whether it can be explained and attributed to some other

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¹ *People v. Quackenboss*, 1 Wheel. Cr. Cas. 91.

² *Preston v. State*, 8 Tex. App. 80.

³ *Lindsay v. People*, 63 N. Y. 143.

innocent motive, are questions for the determination of the jury under all the evidence in the cause.¹

And where the testimony discloses circumstances explaining or excusing flight, which consist with the innocence of the defendant of the crime charged, the jury should be directed to consider the same in connection with the presumption arising from flight, and determine how far they tend to rebut such presumption.²

Such peculiarities of conduct as we have been considering are of themselves entitled to little weight and are not sufficient to warrant conviction.³ In the endeavor to discover truth, no evidence should be excluded; but a case must be scanty of evidence which demands that importance should be attached to circumstances so fallacious as the acts in question. It has been observed, that if the evidence without them is sufficient, this species of evidence is unnecessary, and that if not, then the inference, from language, conduct, and behavior, seems not of sufficient weight to give any conclusive effect to the other proofs.⁴

¹ *Elmore v. State*, 98 Ala. 12; *State v. Moody*, 50 Ia. 443.

² *State v. Mallon*, 75 Mo. 355; *State v. King*, 78 Mo. 555. And see Whart. Cr. Ev. § 750.

³ *Greenfield v. People*, 85 N. Y. 75; *People v. Myers*, 2 Hun, 6; *State v. Palmer*, 65 N. H. 216; *Elmore v. State*, 98 Ala. 12; *Murrell v. State*, 46 Ala. 89.

⁴ Per SHAW, C. J., in *Webster's Case*, *supra*.

CHAPTER VII.

THE SUPPRESSION, DESTRUCTION, FABRICATION, AND SIMULATION OF EVIDENCE.

It is a maxim of law, that *omnia præsumuntur contra spoliatorem*, and the suppression or destruction of pertinent evidence is always therefore deemed a prejudicial circumstance of great weight ;¹ for as no action of a rational being is performed without a motive, it naturally leads to the inference that such evidence, if it were produced, would operate unfavorably to the party in whose power it is to produce it, and who withholds it, or has wilfully deprived himself of the power of producing it. The presumption that a man will do that which tends to his obvious advantage, if he possesses the means, supplies a most important test for judging of the comparative weight of evidence.² All evidence is to be weighed according to the proof which it was in the power of one party to have produced, and in the power of the other to have contradicted.³ A party may not always be compellable to produce evidence against himself, but if it be proved that he is in possession of a deed or other evidence, which, if produced, would decide a disputed point, his omission to produce it would warrant a strong presumption to his disadvantage.⁴

In an action against a railway company for damages for killing stock, the facts in the matter in dispute being peculiarly within the knowledge of the defendant, and it having it in its power to show by its engineer what they were, its failure to produce him as a witness might reasonably raise an inference that his testimony would operate against the defendant.⁵ Where a woman who had sued a railway company for damages for personal injuries was absent on the trial, the jury were in-

¹ *Miller v. People*, 39 Ill. 457.

² *Starkie* (10th Am. Ed.) 846.

³ See observations of Lord MANSFIELD, in *Blatch v. Archer*, Cowp. 65.

⁴ Per Lord MANSFIELD, in *Roe dem. Haldane v. Harvey*, Burr. 2484.

⁵ *Gulf, C. & S. F. Ry. Co. v. Ellis*, 54 Fed. 481.

structed that her absence was a circumstance to be considered, and if not explained, must be taken as a circumstance against her, and as indicating that her evidence would have tended to weaken her case; that it was her duty to be present, and give testimony in her own behalf, if physically and mentally able to do so, and that if she were absent when able to be present, the jury might consider that as evidence tending to impeach the good faith of her claim. This charge was affirmed and pronounced clear and explicit by the Supreme Court on review.¹

In the great case of *Armory v. Delamirie*, a chimney-sweeper having found a jewel, took it to a jeweller to ascertain its value, who, having removed it from the socket, gave him three-halfpence, and refused to return it. The friends of the finder encouraged him to bring an action against the jeweller; and the Lord Chief Justice Pratt directed the jury, that unless the defendant produced the jewel, and showed it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages.² In an action of trover for a diamond necklace which had been unlawfully taken out of the owner's possession, and some of the diamonds were seen shortly afterwards in the defendant's possession, and he could give no satisfactory account how he came by them, the jury were directed to presume that the whole set of diamonds had come to the defendant's hands, and that the full value of the whole was the proper measure of damages.³ In an early English case which has been often cited,⁴ it was found by a special verdict that the testator made his will and gave the premises in question to the plaintiff in error, but afterwards made another will different from the former, but in what particular did not appear. The court decided that the devisee under the first will was entitled against the heir-at-law. But Lord Mansfield said that in case the defendant had been proved to have destroyed the last will it would have been good ground for the jury to find a revocation. On an ejectment involving the title to large estates in Ireland, the question being whether the plaintiff was the legitimate son of Lord Alt-

¹ *Cole v. Lake Shore & M. S. Ry. Co.*, 95 Mich. 77.

² 1 Sm. L. C., 631. And see *Rex v. Lord Melville*, 29 St. Tr. 1457.

³ *Mortimer v. Craddock*, 12 L. J. N. S. 166.

⁴ *Harwood v. Goodright*, Cowp. 87. See 3 Russ. on Crimes (9th Am. Ed.), 218; Starkie on Ed. (10th Am. Ed.) 847.

ham, and therefore prior in right to the defendant, who was his brother, it was proved that the defendant had procured the plaintiff, when a boy, to be kidnapped and sent to America, and on his return, fifteen years afterwards, on occasion of an accidental homicide, had assisted in an unjust prosecution against him for murder: it was held that these circumstances raised a violent presumption of the defendant's knowledge of title in the plaintiff; and the jury were directed that the suppressor and the destroyer were to be considered in the same light as the law considers a spoliator, as having destroyed the proper evidence; that against him defective proof, so far as he had occasioned such defect, must be received, and everything presumed to make it effectual; and that if they thought the plaintiff had given probable evidence of his being the legitimate son of Lord Altham, the proof might be turned on the defendant, and that they might expect satisfaction from him that his brother died without issue.¹ On a bill filed against a defendant who had destroyed a deed by which the plaintiff claimed under certain limitations a real estate, secondary evidence was given of the limitations of the deed; but the evidence, as the witnesses gave it, was of limitations, which could not legally take effect, being of a term of years after an indefinite failure of issue: Sir Joseph Jekyll, the Master of the Rolls, said that as against the man who had destroyed the instrument which would have shown what the rights of the plaintiff were, he would presume even what the plaintiff had not proved, that the limitation was to take place after the failure of issue in the lifetime of a person then in being.²

The foregoing illustrations of the rule of evidence under consideration are not the less pertinent, because they arose in civil cases, since the rules of evidence are the same in all cases, whether civil or criminal; and no inconsiderable proportion of the criminal trials which occur present examples of its practical bearing and effect.³

If evidence within the power of the defendant and inacces-

¹ Craig on dem. of Annesley v. Earl of Anglesea, 17 St. Tr. 1416. And see the Tracy Peerage, 11 C. & F. 154; Clunnes v. Pezzey, 1 Campb. Rep. 8; Lawton v. Sweeny, 8 Jurist, 964; 1 Greenleaf's L. of Ev. § 87; and see the observations of CAMPBELL, L. C. J., in Reg. v. The Midland Railway Company, 20 L. Mag. M. C. 145.

² Dalston v. Cotsworth, 1 P. Wms. 731.

³ Rex v. De la Motte, 21 St. Tr. 810; Rex v. Burdett, *ut supra*.

sible to the State be withheld by the defendant, the jury may infer that if produced it would be against the defendant.¹ Every man will do what he can to shield himself from the disgrace of a conviction of crime, and the burden of punishment. Whenever, therefore, a fact is shown which tends to prove crime upon a defendant, and any explanation of such crime is peculiarly within his knowledge and reach, a failure to offer an explanation must tend to create a belief that same exists.² The failure of a man engaged in trade who is found, under suspicious circumstances, in possession of stolen goods, who declares that he knows, or has the means of ascertaining, the person from whom he received them, and who transferred to him possession in a manner out of the ordinary course of business, to take any steps to point out such person is a potent fact from which a jury could reasonably infer guilt.³ And where, on the trial of an indictment for murder, the testimony of the prisoner's wife, who was an eyewitness to the occurrence, was excluded on the objection of the prisoner's counsel, it was held that the jury had a right to infer that her evidence would not have been favorable to the prisoner.⁴

On the other hand, there is no rule of law that requires, in cases of burglary or larceny, based on circumstantial evidence, that the person who last had innocent possession of the stolen property must be examined by the State, and that the failure to examine such witness creates every presumption favorable to the innocence of the defendant.⁵

Before the absence of evidence can affect the accused, it must appear that there is evidence that would elucidate the matter in dispute, and that it is peculiarly within the knowledge of the accused; then if he is pressed by the force of circumstantial evidence and does not produce the evidence in his power, it may afford a strong presumption against him. He is not bound to produce those who by possibility may have knowledge on the subject to avoid a presumption against him. It is not those who are proved to be so circumstanced as to justify the conclusion that they must have knowledge which, when di-

¹ *State v. Rodman*, 62 Ia. 456.

² *State v. Grehe*, 17 Kan. 458; *Heath v. Waters*, 40 Mich. 457.

³ *Adams v. State*, 52 Ala. 379.

⁴ *People v. Hovey*, 92 N. Y. 554. See also *Gordon v. People*, 38 N. Y. 508.

⁵ *White v. State*, 72 Ala. 195.

vulged, would throw light on the subject.¹ And the rule of evidence under consideration does not apply when the evidence withheld is of no higher degree than that introduced, and is not explanatory of any fact left in uncertainty, but is merely cumulative.²

That one who has knowledge of material facts is not produced as a witness, is not presumptive evidence against the defendant where such person was especially accountable to the prosecution.³ This principle was affirmed in a very recent case where the witness was present in court and subject to the call of either party.⁴

Amongst the most forcible of presumptive indications may be mentioned all attempts to pollute or disturb the current of truth and justice, or to prevent a fair and impartial trial, by endeavors to intimidate, suborn, bribe, or otherwise tamper with the prosecutor, or the witnesses, or the officers or ministers of justice, the concealment, suppression, destruction, or alteration of any article of real evidence; any of which acts clearly brought home to the prisoner, or his agents, are of a most prejudicial effect, as denoting on his part a consciousness of guilt, and a desire to evade the pressure of facts tending to establish it.⁵ On a trial for larceny it may be shown that the accused had threatened a witness of the State in order to prevent him from testifying in the case; and the fact that he had been acquitted on a charge of intimidating the same witness is no bar to the admissibility. The record of acquittal may go to the jury with other evidence to be taken for what it is worth.⁶ And in an action for slander it was held that testimony tending to prove an attempt by the defendant to prevent the attendance on the trial of a witness in behalf of the plaintiff, was admissible against the defendant as evidence tending to confirm the witness whose testimony was thus sought to be suppressed.⁷ In the same case evidence was admitted tending to

¹ *People v. McWhorter*, 4 Barb. 438.

² *Haynes v. McRae*, 101 Ala. 318.

³ *State v. Rosier*, 55 Ia. 517; *People v. Sweeney*, 41 Hun, 332; *State v. Cousins*, 50 Ia. 250.

⁴ *Haynes v. McRae*, *supra*. See also *Pollak v. Harmon*, 94 Ala. 420; *Bates v. Morris*, 101 Ala. 282.

⁵ *Rex v. Crossfield*, 26 St. Tr. 217; *Rex v. Donellan*, *Rex v. Donnell*, Reg. v. Palmer, *infra*. ⁶ *State v. Baden*, 42 La. Ann. 295.

⁷ *Carpenter v. Willey*, 64 Vt. 212. And see *Kirkaldie v. Paige*, 17 Vt. 256.

show an attempt by the defendant to manufacture evidence with which to impeach the plaintiff's character. He had said to the witness, "If you know anything about it that will help me, it will put \$25 into your pocket." On an indictment for larceny it was shown that the defendant went to the prosecuting witness and attempted to bribe him to swear that certain tracks had no connection with the larceny.¹ In a civil case proof of the fabrication of evidence of the payment of money was considered damaging to the plaintiff's case.²

But legal experience has shown that false evidence is some-

¹ *Kimbrough v. State*, 76 Ga. 787. See also *Williams v. State*, 22 Tex. Crim. App. 497. Mr. Evans (2 Pothier, by Evans, 837) observes that one of the most difficult points in the Douglas cause arose from the fact that Sir John Stewart had fabricated several letters as received from the surgeon, La Marre; and cites the following observations of Mr. Stewart on the subject:—

"I have been accustomed to think, that in judging upon evidence, a matter of such infinite importance in the constitution and jurisprudence of every well-regulated State, there were certain rules established, which in every court, and in every country, were received as most invaluable guides for the discovery of truth. For instance, when it appeared that on the one side there was *forgery* and *fraud* in some material parts of the evidence, and especially when that forgery could be traced up to its source, and discovered to be the contrivance of the very person whose guilt or innocence was the object of inquiry; in such a case I have always understood it to be an established rule, that the whole of the evidence on that side of the question must be deeply affected by a deliberate falsehood of this nature.

"The natural and necessary effect of such a practice upon the minds of judges possessed of discernment and candor, is to make them extremely suspicious of all the evidence tending to the same conclusion with the forged evidence. Parol testimony in support of it will be little regarded: the forgery of the written evidence contaminates the testimony of the witnesses in favor of the party who has made use of that forgery; and nothing will gain credit on that side, but either clear and conclusive written evidence, free from suspicion, or the testimony of such a number of respectable, disinterested, and consistent witnesses, speaking to decisive and circumstantial facts as leaves no room to doubt of the certainty of their knowledge, and the truth of their assertions.

"On the other hand, the proof of a forgery, such as has been described, must also have the effect to gain a more ready admission to the evidence of the other party. If that evidence be consistent, if it be established by the concurring testimony of a crowd of witnesses, and supported by various articles of written and unsuspected evidence, the bias of a fair mind will be totally in favor of the party producing such authorities, and against that which had been obliged to have recourse to the forged evidence." See *Stark. on Ev.* (10th Am. Ed.) 847, n.

² *Winchell v. Edwards*, 57 Ill. 41.

times resorted to for the purpose of proving facts that are true.¹ Perhaps the most notable case of this kind is that cited by Sir Edward Coke of an uncle who was hanged for the murder of his niece, who produced on the trial a child much like the niece in person and years, but who turned out not to be the true child. It afterwards appeared that the niece was alive and in hiding.² And so it has been held error to charge the jury that where a party in a cause attempts to manufacture testimony, the jury are justified and warranted in presuming that his case is not well founded, while the testimony, offered on behalf of a party whom the jury find to have tampered with witnesses should be carefully and even suspiciously scrutinized, yet that testimony is not to be wholly disregarded and set aside, and the verdict be left to rest on a presumption arising from the party's misconduct, however flagrant, and however clearly proved.³ And, as has been well said, the denial of a known fact, and the attempt to conceal, destroy, or prevent evidence of the minor's title to property, or which is calculated to prove guilt, may, and does, often occur from fear of a groundless charge, based upon suspicious circumstances, or a covetous desire to retain property for which one has paid, under the supposition that he was acquiring a *bona fide* title, but which he afterwards finds belongs to another.⁴ If the evidence in regard to the alleged falsehood or falsification be doubtful, it is entitled to no weight. To be entitled to any force, its truth should be established beyond all question or cavil.⁵

Perhaps in no case have circumstances of this kind held with such fatal effect as in that of Donellan, who was convicted of the murder of Sir Theodosius Boughton by poison. The prisoner, after having administered the fatal draught in the form of medicine, rinsed out the phial which had contained it, and when that fact was stated before the coroner, he was observed to check the witness by pulling her sleeve. In his charge to the jury, Mr. Justice Buller laid great stress upon that circumstance. "Was there anything so likely," said the learned judge, "to lead to a discovery as the remains, however small

¹ 1 Phil. Ev. 448.

² 3 Inst. 282. See 3 Russ. on Crimes (9th Am. Ed.), 218. See also the Douglas Peerage Case, 2 Pothier, by Evans, 337, and the remarks of Mr. Evans thereon.

³ Heslop v. Heslop, 82 Pa. St. 537.

⁴ See opinion of the court in Beck v. State, 44 Tex. 430. And see 3 Greenl. on Ev. § 84.

⁵ State v. Williams, 27 Vt. 724.

they might have been, of medicine in the bottle? But that is destroyed by the prisoner. In the moment he is doing it, he is found fault with. What does he do next? He takes the second bottle, puts water into that, and rinses it also. He is checked by Lady Boughton, and asked what he meant by it—why he meddled with the bottles. His answer is, he did it to taste it; but did he taste the first bottle? Lady Boughton swears he did not. The next thing he does, is to get all the things sent out of the room; for when the servant comes up, he orders her to take away the bottles, the basin, and the dirty things. He puts the bottles into her hand, and she was going to carry them away, but Lady Boughton stopped her. Why were all these things to be removed? Why was it necessary for the prisoner, who was fully advertised of the consequence by Lady Boughton, to insist upon having everything removed? Why should he be so solicitous to remove everything that might lead to a discovery?¹ As to the conduct of the prisoner before the coroner, Lady Boughton had mentioned the circumstance of the prisoner's rinsing out the bottle, one of the coroner's jury swears that he saw him pull her by the sleeve. Why did he do that? If he was innocent, would it not be his wish and anxious desire, as he expresses in his letter, that all possible inquiry should be made? What passes afterwards? When they get home, the prisoner tells his wife that Lady Boughton had given this evidence unnecessarily; that she was not obliged to say anything but in answer to questions that were put to her, and that the question about rinsing out the bottles was not asked her. Did the prisoner mean that she should suppress the truth? that she should endeavor to avoid a discovery as much as she could by barely saying Yes or No to the questions that were asked her, and not disclose the whole truth? If he was innocent, how could the truth affect him? but at that time the circumstance of rinsing out the bottles appeared even to him to be so decisive that he stopped her on the instant, and blamed her afterwards for having mentioned it. All these," said the learned judge, "are very strong facts to show what was passing in the prisoner's own mind." A boatman was convicted of stealing rum which had been delivered to his master, a carrier by canal, for conveyance from Liverpool to Birmingham. The carrier's agent at Liver-

¹ Gurney's Rep., *ut supra*.

pool had taken a sample of the spirit and tested its strength ; and upon delivery at its place of destination, the spirit was found to be under proof, and the portion abstracted had been replaced with water. The carrier's clerk, on the complaint of the consignee, went to the boat where the prisoner was, to require explanation ; but as soon as he had stepped into it, the prisoner pushed him back upon the wharf and forced the boat into the middle of the canal, where he broke three jars, and emptied their contents, which by the smell were proved to be rum, into the canal.¹

Other facts of the same kind are the common cases of the obliteration, effacing, or otherwise removing marks of ownership or identity from plate, linen, or other articles of property, or of stains of blood or other matter from the person or dress of the accused, or the suggestion or insinuation of false, groundless, or deceptive hypotheses or explanations, in order to neutralize or account for adverse facts or appearances. It is on the principle of these cases that, by statute in England if any person on board a vessel which is chased by an officer of the preventive service shall throw overboard, stave, or destroy any part of the freight, the vessel is declared to be forfeited ; and that goods liable to duty concealed on board any vessel are also declared to be forfeited ;² and that other similar statutable presumptions have been created ; and that whenever absent witnesses are so mixed up with transactions before the court as to give rise to comments on their not being present, it is the common practice to prove the cause of their non-attendance, as, for instance, death, illness, or having quitted the country.³

Another fact of this kind is the attempt to prevent *post mortem* examination by the premature interment of human remains, under the pretext that it is rendered necessary by the state of the body, since it cannot but be known that such examination will always furnish important, and generally conclusive, evidentiary matter as to the cause of death.⁴ And it is a reasonable inference, where a homicide has been committed, and the body concealed, that the party who concealed the

¹ *Rex v. Thomas*, Warwick Spr. Ass., 1846, coram Mr. Justice BOSANQUET.

² St. 8 & 9 Vict. c. 7, §§ 5, 6, 29.

³ Per POLLOCK, L. C. B., in *Cowper v. French*, Exch. N. P., July 10, 1850.

⁴ *Rex v. Donellan*, *Rex v. Donnell*, *Rex v. Palmer*, *infra*.

body committed the crime.¹ In this connection may be mentioned the concealment of death by the destruction or attempted destruction of human remains.²

But in this case the presumption of criminality results from the act of concealment rather than from the nature of the means employed, however revolting, which must be regarded only as incidental to the fact of concealment, and not as aggravating the character and tendency of the act itself. Where a prisoner tried for murder admitted that he had cut off the head and legs from the trunk of a female, and concealed the remains in several places, but alleged that her death had taken place by accident while she was in his company, and that in the alarm of the moment, and to prevent suspicion, he had determined to conceal the death, Lord Chief Justice Tindal told the jury that the concealment of death under such circumstances had always been considered to be a point of the greatest suspicion, but that this evidence must be received with a certain degree of modification, and especially in a case where the feelings might be excited by the singular means of concealment adopted by the prisoner; that this point of evidence was therefore for the consideration of the jury, and that it was for them to judge how far it was a proof of the prisoner's guilt; but the mere general fact of the concealment, added the learned judge, is to be considered, and not the circumstances under which it took place.³

Other such facts are the officious affectation of grief and concern as an artifice to prevent or avert suspicion,⁴ false representations as to the state of the party's health, or the utterance of obscure or mysterious predictions or allusions, the pretence of supernatural dreams, noises, or other omens or intimations, calculated to prepare the connections for the event of sudden death, and to diminish the surprise and alarm which naturally follow such an event. A woman who was convicted of murder, about a month before the catastrophe told the mother of an infant child whom she poisoned, as well as her

¹ *State v. Dickson*, 78 Mo. 488. And see *Burrill*, Circ. Ev. 88.

² *Rex v. Gardelle*, 4 Celebrated Trials, 400; *Rex v. Cook*, *infra*; *Reg. v. Good*, Sess. Pap., May, 1842.

³ *Rex v. Greenacre*, C. C. Court, April, 1887, *infra*; and see Prof. Webster's case, *Bemis's Report*, *ut supra*, 5 Cush. 295.

⁴ *Rex v. Blandy*, *ut supra*; *Rex v. Patch*, *infra*.

own husband and child, that she had had her fortune told, and that within six weeks three funerals would go from her door, those of her husband and son and the child of the person she was addressing.¹

The fabrication of simulated facts and appearances calculated to create alarm, or otherwise to give a delusive tendency and interpretation to inculpatory facts, is an artifice frequently resorted to for the avoidance, neutralization, or explanation of circumstances naturally presumptive of guilt; the resort to which is of the most prejudicial criminative tendency, inasmuch as it necessarily implies an admission of their truth, and a consciousness of the inculpatory effect, if uncontradicted or unexplained, of the facts which it thus seeks to divest of their natural significancy. As instances of such simulated facts may be mentioned the pretence of having partaken of a poisonous draught which has caused death;² the self-infliction of slight wounds to raise the inference that the offender had himself been the object of deadly attack;³ the attempt to fix guilt or suspicion upon others by the groundless suggestion of malicious feelings;⁴ the placing of a razor, pistol, or other weapon in the hand of or near to a dead body to lead to the notion of suicide, and many other such acts. But cunning is "a sinister or crooked wisdom," and not unfrequently the very means employed to prevent suspicion lead to the discovery of the real truth. A murderer, to simulate the appearance of suicide, placed a razor in the left hand of a right-handed woman.⁵ A man was found shot, and his own pistol lying near him; but, although no person had been seen to leave the house, the suspicion of suicide was negatived by the fact that the ball was too large to have entered the pistol.⁶

A recent case affords an appropriate illustration in this connection. The defendant, indicted for murder, told the persons who gathered at the scene on the night of the homicide, that the deceased came to her death by her clothes accidentally catching fire while she (deceased) was asleep, and that

¹ *Rex v. Holroyd*, 4 Cel. Tr. 167. And see *Rex v. Donellan* and *Rex v. Donnall*, *infra*.

² *Rex v. Nairn and Ogilby*, 19 St. Tr. 1284; *Rex v. Wescombe*, Exeter Summ. Ass., 1839. *Reg. v. Bolam*, Durham Summer Ass., 1839.

³ *Rex v. Patch*, *ut supra*.

⁴ *Rex v. Fitter*, Warwick Summer Ass., 1834, coram Mr. Justice TAUNTON.

⁵ 3 P. & F. Med. J. 34.

the defendant, while attempting to put out the flames, "burnt one of her hands." At the inquest the defendant was compelled to unwrap the hand which she represented as injured, and to exhibit it to a physician present, and "there was no indication of any burn whatever upon it."¹

A very remarkable case of this kind is recorded in the State Trials, which was tried at Hertford Assizes, 4 Car. I., before Mr. Justice Harvey. A woman was found dead in her bed with her throat cut, and a knife sticking in the floor. Several persons of the family who slept in the adjoining room deposed that the deceased went to bed with her child, her husband being absent, that the prisoners slept in the adjoining room, and that no person afterwards came into the house. The coroner's jury were inclined to return a verdict of *felo de se*, but suspicion being excited against these individuals, the jury, whose verdict was not yet drawn up in form, desired that the remains of the deceased might be taken up, and accordingly, thirty days after her death, they were taken up, and the jury charged the prisoners with the murder. Upon their trial they were acquitted, but so much against the evidence, that the judge let fall his opinion that it were better an appeal were brought than so foul a murder should escape unpunished. Accordingly an appeal was brought by the child against his father, grandmother, and aunt, and her husband. On the trial of the appeal before Chief Justice Hyde, the evidence adduced was, that the deceased lay in a composed manner in her bed, with the bed-clothes undisturbed, that her child lay by her side, that her neck was broken, and that her throat was cut from ear to ear. There was no blood in the bed, except a tincture on the bolster where her head lay. From the bed's head there was a stream of blood on the floor, which ran along till it pounded in the bendings of the floor, and there was also another stream of blood on the floor at the bed's foot, which pounded also on the floor to a very great quantity; but there was no communication of blood between these two places, nor upon the bed. A bloody knife was found in the morning sticking in the floor, at some distance from the bed; but the point of the knife, as it stuck, was towards the bed, and the handle from the bed; and there was the print of the thumb and fingers of a left hand. It was beyond all question, from the circumstances,

¹ State v. Garrett, 71 N. C. 85.

that the deceased had been murdered, for if she had committed suicide by cutting her own throat, she could not by any possibility have broken her own neck in bed. The father, grandfather, and aunt were convicted and executed.¹

Two persons were convicted of murder; and it appeared that the deceased was murdered in the night, and that the prisoners, one of whom was his niece, and the other his servant man, had given an alarm from within the house; whereas the undisturbed state of the dew on the grass on the outside rendered it certain that the parties implicated were domestics.²

The fact that the defendant tells a false story as to his whereabouts at the time of the commission of the crime with which he is charged, is a strong circumstance against him.³ The defendant's case is often much weakened by an unsuccessful attempt to prove an *alibi*. This result happens, not because of any implied or technical admission involved in undertaking the defence, but because of fraud and subornation of perjury manifested in the attempt.⁴ An *alibi*, it has been said, is not, in the strict and accurate sense, a special defence, but a traverse of the material averment in the indictment, that the defendant did, or participated in, the particular act charged, and is comprehended in the general plea, "not guilty."⁵

This defence is frequently fabricated, and is liable to many sources of fallacy, which will be more appropriately considered in a subsequent part of this volume; and a learned judge has said, that if the defence turns out to be untrue, it amounts to a conviction.⁶ But it must be borne in mind that the unfavourableness to the accused resulting from the attempt to prove the *alibi* by means of fabricated testimony consists in the fact that the accused is attempting to shield himself by corrupting the administration of law, and by relying upon what he knows to be without foundation.⁷

It must not be overlooked, however, that, such is the weakness of human nature, that there have been cases where

¹ *Rex v. Okeman et al.* Comp. 10 Harg. St. Tr. App. 2, 29, and 14 St. Tr. 1824.

² *Rex v. Jeffreys & Swan*, 18 St. Tr. 1194.

³ *People v. Riley*, 3 N. Y. Cr. R. 374.

⁴ *Toler v. State*, 16 Ohio St. 588.

⁵ *Allbritton v. State*, 94 Ala. 76; *Turner v. Com.*, 86 Pa. St. 54; *Brice-land v. Com.*, 74 Pa. St. 463.

⁶ Per Mr. Justice DALY, in *Rex v. Killan*, 20 St. Tr. 1085.

⁷ *Adams v. State*, 28 Fla. 511.

innocence, under the alarm of menacing appearances, has fatally committed itself, by the simulation of facts for the purpose of evading the force of circumstances of apparent suspicion, and in many cases of this nature a false defence is innocently interposed under a mistake as to dates, or the order of events. In other cases the defence is true and the evidence fails to establish it.¹ So that the fact that the evidence fails to establish the defence ought not to have any weight against the prisoner unless it is established beyond all question that his story is a fabrication.²

When the defence of an *alibi* fails, it is generally on the ground that the witnesses are disbelieved, and the story considered to be a fabrication; thus, in one case, two witnesses testified that the prisoner was at his house during the whole of the night of the murder: the jury nevertheless, in view of all the circumstances, returned a verdict of guilty.³ And from the facility with which the defence is fabricated, it is commonly entertained with suspicion, and sometimes, perhaps, unjustly so.⁴

¹ See the opinion in the case of *Toler v. State*, 16 Ohio St. 583.

² *State v. Ward*, 61 Vt. 153.

³ *Phipps v. State*, 3 Cold. 344.

⁴ *Rex v. Robinson*, *infra*. See further, *infra*.

CHAPTER VIII.

EXPERT TESTIMONY.

SECTION I.

Consideration of the Rules Governing the Admission of this Kind of Testimony.

THE testimony of skilled or scientific witnesses constitutes a very important source of circumstantial evidence, especially in regard to the proof of the *corpus delicti* in cases of suspected homicide, and in questions concerning the *doli capax*. Such evidence in its details belongs to other departments of science; but as the principles which govern its reception and application fall exclusively within the province of jurisprudence, some general observations upon it are therefore necessary.

If it be true that truth is nothing more than a presumption of the highest order, *a fortiori* is such the case with respect to the testimony of skilled or scientific witnesses, which not unfrequently presents a sequence of presumptions grounded upon conflicting opinions, even with regard to the actual state of science. Such testimony is therefore of a nature *sui generis*, and, according to the attainments and means of knowledge of the witness, may be of little moment, or deserving of entire and undoubting confidence.

Science, moreover, is never final; and new facts are every day found to disturb or modify long-established convictions. Thus Reinsch's test, which had long been confidently employed for the separation of arsenic, was discovered to be fallacious when applied to chlorate of potass, and the arsenic which was found in the particular mixture had been set free from the copper employed in the experiment.¹

¹ Reg. v. Smethurst, C. C. C. Aug. 1859, Sess. Paper.

Although, in general, a witness cannot be asked what his opinion upon a particular question is, since he is called for the purpose of speaking as to facts only; yet where matters of skill and judgment are involved, a person competent to give an opinion may be asked what that opinion is.¹

"Many nice questions," remarked Lord Mansfield, "may arise as to forgery, and as to the impression of seals, whether the impression was made from the seal itself, or from an impression in wax. In such cases I cannot say that the opinion of seal-makers is not to be taken." And so an engineer was allowed to testify what was, in his opinion, the cause of a harbor being blocked up.² Judge Earl of the New York Court of Appeals has thus declared the principles upon which this character of evidence is admitted: "Witnesses who are skilled in any science, art, trade, or occupation, may not only testify to facts, but are sometimes permitted to give their opinions as experts. This is permitted because such witnesses are supposed, from their experience and study, to have peculiar knowledge upon the subject of inquiry which jurors generally have not, and are thus supposed to be more capable of drawing conclusions from facts, and to base opinions upon them, than jurors generally are presumed to be. Opinions are also allowed in some cases where, from the nature of the matter under investigation, the facts cannot be adequately placed before the jury so as to impress their minds as they impress the minds of a competent, skilled observer, and where the facts cannot be stated or described in such language as will enable persons not eye-witnesses to form an accurate judgment in regard to them, and no better evidence than such opinions is obtainable."³

In an action for damages for an alleged rape, the plaintiff having given birth to a child, the defendant denied that he was the father of the plaintiff's child, and the plaintiff testified that, previous to the assault made upon her by the defendant, which resulted in her pregnancy, she had never had sexual

¹ *Rochester v. Chester*, 3 N. H. 349; *Forbes v. Carothers et al.*, 3 Y. 527; *Gentry v. McMinnis*, 3 Dana, 382; *Bullock v. Wilson*, 5 Porter, 388; *Kellogg v. Krauser*, 14 S. & R. 137; *Morse v. State*, 6 Conn. 9; *People v. De Graff*, 1 Wheel. C. C. 205; *People v. Rolfe*, 61 Cal. 540. And see 1 *Roscoe Crim. Ev.* (8th Am. Ed.) 222.

² *Folkes v. Chad*, 3 Dougl. 157; 4 T. R. 498.

³ *Ferguson v. Hubbell*, 97 N. Y. 507.

intercourse with any man. The defendant called a physician and asked him the hypothetical question whether, in his opinion, pregnancy would probably result from first intercourse in a case where the female had been ravished and the act accomplished against her will. The plaintiff's counsel objected to this question on the ground, among others, that the subject of inquiry was not such as to admit the opinions of expert witnesses; that it involved no question of science or skill, and the answer must necessarily be speculative in its character. The court having overruled the objection, the plaintiff excepting, the witness gave his opinion that it would not. The Court of Appeals sustained the ruling, O'Brien, J., who delivered the opinion, saying: "The inquiry as to the conditions under which pregnancy may occur is one peculiarly within the range of medical science and skill. The common knowledge and judgment of mankind may be greatly aided in an inquiry of this character by the opinions of learned and scientific men who have made the laws governing the complex physical organism of the human race the subject of profound research and study."¹

But while "scientific persons may give their opinion on matters of science, witnesses are not receivable to state their views on matters of legal or moral obligations, nor on the manner in which others would probably be influenced, if the parties acted in one way rather than another." And therefore it has been held, that the materiality of a fact concealed at the time of insuring was a question for the jury alone.² And on a criminal trial, in the question of sanity, the witness should give his opinion as to the state of mind, and not as to the responsibility of the prisoner.³

The exceptions to the rule are confined to questions of science, trade, and a few others of the same nature.⁴ A party has no right to ask the opinion of a professional witness upon any question except one of skill or science.⁵ The testimony of experts, as experts, cannot be received on subjects of

¹ *Young v. Johnson*, 123 N. Y. 226.

² *Campbell v. Rickards*, 5 B. & Ad. 840.

³ *Reg. v. Richards*, 1 F. & F. 87.

⁴ *Morehouse v. Matthews*, 2 Comst. 514; *State v. Stickley*, 41 Ia. 332; *Lambkin v. State*, 12 Tex. Crim. App. 341; *Debbs v. State*, 43 Tex. 650.

⁵ *Paige v. Hagard*, 5 Hill, 603; *Woodon v. People*, 1 Park. Crim. R. 464; *People v. Bodine*, 1 Denio, 482; *People v. Thurston*, 1 Park. Crim. R. 49.

general knowledge, familiar to men in general, and with which jurors are supposed to be acquainted.¹ The rule was illustrated in a case in the Supreme Court of the United States, where Mr. Justice Strong said that while it was proper to explain obscure words or phrases of art by reference to the art or science to which the words were appropriate, it was not so when the words or phrases were familiar to all classes, grades, and occupations.² In a later case the effort was to put the opinion of commercial experts in the place of that of the jury, upon a question which was as well understood by the community at large as by merchants and importers, and the testimony was rejected.³

A physician cannot be asked his opinion as an expert, as to whether rape could have been committed in a certain way, if the question can be decided without special professional knowledge.⁴ Nor can a physician testify as an expert on the damages resulting from a failure to keep a contract not to practise within a specified time.⁵ Nor can he testify as to whether or not certain domestic troubles are sufficient to cause insanity.⁶

The value of an article in common use, such as a shotgun, unlike that of precious stones, paintings, etc., may be estimated by almost every man in the community.⁷

The danger and liability to accident existing when several persons go out hunting in company is within the ordinary observation of men acquainted with the use of fire-arms, and the common principles of human conduct.⁸ The question whether one shot through a window could have seen and recognized the one outside who shot, was not one of skill or science, but one which it was the province of the jury to determine from the evidence as to the circumstances and condition of things at the time of the shooting, and therefore not

¹ *Mayhew v. Sullivan Mining Co.*, 76 Me. 100; *Harvey v. U. S.*, 18 Ct. Cl. 470; *Conner v. Stanley*, 67 Cal. 315; *McKay v. Overton*, 65 Tex. 32; *Concord Rd. v. Greeley*, 23 N. H. 237; *Com. v. Collier*, 134 Mass. 203; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 472; *Connecticut Mutual Life Ins. Co. v. Lathrop*, 111 U. S. 618; *New Jersey Traction Co. v. Brabban*, 32 Atl. 217. ² *Greenleaf v. Goodrich*, 101 U. S. 278; 25 L. Ed. 845.

³ *Schneider v. Barney*, 113 U. S. 645.

⁴ *Cook v. State*, 4 Zab. 843.

⁵ *Linn v. Sigsbee*, 67 Ill. 75.

⁶ *Carter v. State*, 56 Ga. 463.

⁷ *Cooper v. State*, 53 Miss. 398.

⁸ *State v. Anderson*, 10 Ore. 448.

a subject for the testimony of an expert.¹ Where a witness was asked, "Now, in your opinion as an expert, would that plastering be in the condition that you found it, had the building since the plastering was placed there settled six or seven inches?" An objection was properly sustained, for it is apparent to any one that the plaster of a building which has settled six or seven inches cannot be in the condition that it was before it settled.²

It is not necessary to resort to expert testimony to prove that a railroad embankment was improperly or negligently constructed so as to obstruct water.³ And a non-expert witness may testify that certain stains are blood,⁴ or that certain hairs are from the head of a human being;⁵ and such a witness may make an estimate as to the speed of a railroad train.⁶

But where a question arose as to the safety of a circular saw of large dimensions which had been repaired, it was held that the testimony of an expert might be received.⁷

Experts are not allowed to give their opinion on a case when its facts are controverted,⁸ but counsel may put to them a state of facts and ask their opinion thereon.⁹

A professional witness, present during the trial, cannot base his testimony upon a recollection and construction of the evidence given in the case. He must base his opinion upon his own testimony or upon a statement of the facts assumed to have been proven.¹⁰

On a trial for murder, before Lord Chief Justice Tindal, several medical witnesses, who had been present during the

¹ *Jones v. State*, 71 Ind. 66.

² *Richardson v. City of Eureka*, 96 Cal. 443.

³ *Lincoln & B. H. R. Co. v. Sutherland* (Neb.), 62 N. W. 859.

⁴ *State v. Robinson*, 117 Mo. 649.

⁵ *People v. Thiede* (Utah), 39 Pac. 837.

⁶ *Ala. G. S. R. Co. v. Hall* (Ala.), 17 So. 176.

⁷ *Lan v. Fletcher* (Mich.), 62 N. W. 357.

⁸ *U. S. v. McGhee*, 1 Cush. C. C. 1; *Daniels v. Musher*, 2 Mich. 183; *Brown v. Com.*, 14 Bush (Ky.), 398; *State v. Cole*, 94 N. C. 958.

⁹ *Dejarnette v. Com.*, 75 Va. 867; *Luning v. State*, 1 Chand. 178; *Lake v. People*, 1 Park. Crim. R. 495; *State v. Bowman*, 98 N. C. 509; *Noonan v. State*, 55 Wis. 258; *Reed v. People*, 1 Park. Crim. Rep. 481.

¹⁰ *Moore v. State*, 17 Ohio St. 521; *State v. Felter*, 25 Ia. 67; *Burns v. Barenfield*, 84 Ind. 43; *Craig v. Noblesville & Stony Creek G. R. Co.*, 98 Ind. 109; *Reynolds v. Robinson*, 64 N. Y. 395; *Gills v. Brown*, 9 C. & P. 601; *Gutterman v. Liverpool, etc., Steamship Co.*, 83 N. Y. 358; *Link v. Sheldon*, 136 N. Y. 1; *McCarty v. Com.* (Ky.), 20 S. W. 229.

trial and heard the whole of the evidence, but had no other means of forming an opinion on the question, were admitted to testify that in their judgment the prisoner was insane. But the propriety of admitting such evidence having been made the subject of discussion in the House of Lords, the question was submitted to the judges, who were of opinion that a medical witness could not in strictness be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or whether he was conscious at the time of doing the act that he was acting contrary to law, or whether he was laboring under any and what delusions, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of science; in which case such evidence is admissible; but that where the facts are admitted, or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as matter of right.¹

On a subsequent occasion, Mr. Baron Alderson, with the concurrence of Mr. Justice Cresswell, refused to allow a witness to be asked whether, from all the evidence he had heard, both for the prosecution and defence, he was of opinion that the prisoner at the time he committed the act was of unsound mind, and said that the proper mode is to ask what are the symptoms of insanity, or to take particular facts, and, assuming them to be true, to ask whether they indicate insanity on the part of the prisoner; but to take the course suggested, he said, was really to substitute the witness for the jury, and to allow him to decide upon the whole case; that the jury must have the facts before them, and that they alone must interpret them by the general opinions of scientific men.² Upon a trial for murder, where the death was alleged to have been caused by suffocation, a physician who had attended in court and heard the evidence was asked his opinion as to the cause of death; but Mr. Justice Patteson expressed himself very strongly upon the unsatisfactory nature of such evidence, the witness not having seen the body, and his opinion being founded on the

¹ Reg. v. M'Naghten, 10 Cl. & F. 200; 1 C. & K. 138; 8 Scott N. R. 595.

² Reg. v. Frances, 4 Cox C. C. 57.

facts stated by other witnesses.¹ These cases have been followed in England by a series of determinations in which such evidence has been held to be inadmissible.²

The interrogatories to be put to an expert are not as to what his opinion is of the testimony, but what is his opinion of the facts as stated to him by the questioner.³ The assumed facts should be stated as facts.⁴ To predicate a hypothetical question upon "all the testimony" in the case, is error.⁵

The questions must be so shaped as to give the witness no occasion to mentally draw his own conclusions from the whole evidence or a part thereof, and from the conclusions so drawn express his opinion, or to decide as to the weight of evidence or the credibility of the witnesses; and his answer must be such as not to involve any such conclusions so drawn, or any opinion of the expert, as to the weight of the evidence or credibility of the witnesses.⁶

The jury are the judges of the facts. The witness can state what is insanity or what causes insanity, but he must assume hypothetical facts when he tells the jury his conclusions.⁷

Where there were conflicting symptoms and indications and a direct conflict of testimony, a witness was improperly asked to give his opinion based on the testimony, as to the soundness or unsoundness of mind of the defendant.⁸

Where a witness, after giving his opinion as to the insanity of the deceased, based on his personal knowledge and observation, stated that he had heard all the testimony in the case, he was asked, "In view of the testimony as you have heard it, and in connection with your own knowledge of the state of Mr. D. at the time he was in the asylum, in your opinion was he, or was he not, at that time, insane?" To this he answered, "That opinion I have already expressed—that he was not insane—based upon my own personal knowledge." The court

¹ *Reg. v. Newton*, Shrewsbury Spring Ass., 1850.

² *Reg. v. Pate*, C. C. C. 12th July, 1850; *Doe d. Bainbridge v. Bainbridge*, coram CAMPBELL, L. C. J., Stafford Summer Ass., 1850; *Cox's C. C.* 454; *Reg. v. Leyton*, Id. 149, coram ROLFE, B.

³ *Butler v. St. Louis Life Ins. Co.*, 45 Ia. 93. And see *Perkins v. Concord Ry. Co.*, 44 N. H. 223; *Fairchild v. Bascomb*, 35 Vt. 398.

⁴ *Russ v. Wabash West. Ry. Co.*, 112 Mo. 45.

⁵ *People v. McElvaine*, 121 N. Y. 250.

⁶ *McMechem v. McMechem*, 17 W. Va. 684.

⁷ *State v. Coleman*, 20 S. C. 441; *Price v. Richmond & W. R. Co.*, 38 S. C. 199.

⁸ *Smith v. Hickenbotham*, 57 Ia. 733.

told the witness that a hypothetical case was put to him ; and the question was again asked in this form : " I want the opinion now with your own individual observation, from what has reached you in the testimony ; " to which the witness replied : " The testimony has not served to induce me to change my opinion already expressed. " The court allowed these questions against objection, and this was held erroneous.¹

In an action brought to recover damages for the breach of a contract of charter-party, where the defence was predicated upon the evidence given by the master of the vessel, and the plaintiff endeavored to avoid the effect of it by showing that the vessel, by proper management, might have entered one of the ports of the Gulf of Mexico, where her injuries could have been repaired, and she enabled to return for her cargo, a witness was asked : " Under the state of facts mentioned in that deposition, what ports could the captain have made in the Gulf of Mexico ? " The question was improperly allowed.² In an action to recover damages for the death of the plaintiff's intestate, caused by the alleged wrongful acts of the defendant's servants, the court, speaking by Mitchell, J., said : " It was entirely proper to inquire of these experts as to the probable effect of excitement or physical exertion upon one in deceased's diseased condition, but we never knew of a case, and have not been referred to any, where it was ever permitted to repeat to a witness all the evidence in the case, and then ask him what verdict, in his opinion, ought to be rendered in the case, which was in effect what was sought to be done in this instance. Courts have gone far enough in subjecting life, liberty, and property to the mere speculative opinions of men claiming to be experts, and we are not disposed to extend the rule into the field of mere hypothetical conjecture. " ³

But where the witnesses are men of unquestionable character and ability, it can hardly be material whether the question is asked in a more or less direct form ; especially as there can be no difficulty in so shaping the question as to mask while it substantially involves the precise objection ; and in several cases in England medical witnesses have been permitted with-

¹ *Butler v. St. Louis Life Ins. Co.*, 45 Ia. 93.

² *Dolly v. Morris*, 10 Hun, 201.

³ *Briggs v. Minneapolis St. Ry. Co.*, 52 Minn. 36.

out objection to give their opinions as to sanity of parties charged with crime, as grounded upon the evidence that had been adduced both for the prosecution and the defence; though, if made, the objection must of course prevail.¹

And it is held that where the rule is substantially, though not strictly observed, the judgment will be allowed to stand. A witness was asked, "Upon the hypothesis that the testimony given by the witnesses in this case, etc., is all true, what would be your opinion, etc.?" And this was held not open to objection.² In an action against a physician for malpractice, after the manner in which the operation had been performed was shown, and it having been shown that the expert had heard the testimony, he was asked, "Suppose the statement relative to the amputation and its subsequent treatment to be truthful, was or was not the amputation well performed? Was the subsequent treatment proper or improper? And in your opinion was or was not the death of the patient the result of any neglect or want of skill in the surgeon?" These questions were held purely hypothetical and correct.³

It is said in support of this position that, "where the facts are not complicated, and the evidence is not contradictory, and the terms of the question require the witness to assume the facts stated as true, he is not required to draw a conclusion of fact."⁴

Hypothetical questions must be based on facts proved or which the evidence tends to establish.⁵ Though a witness has no knowledge of the nature and amount of services rendered, still his opinion on the question of value may be given in reply to a question stating the nature and amount of such services hypothetically. But to render such evidence competent there must be testimony in the case tending to show that the services thus stated were in fact rendered. If the hypothetical case is imaginary the evidence ought not to go to the jury, for it will

¹ *Reg. v. Baranelli*, C. C. C., Ap. 1855; *Reg. v. Westron*, C. C. C., Feb. 1856; *Starkie's L. of Ev.* (4th Ed.) 175.

² *Negroes Jerry et al. v. Townshend*, 9 Md. 145.

³ *Wright v. Hardy*, 22 Wis. 348.

⁴ *Hunt v. Lowell Gas Light Co.*, 8 Allen (Mass.), 169.

⁵ *State v. Anderson*, 10 Ore. 448; *Rogers*, *Expert Testimony* (2d Ed.), § 27. And see *Champ v. Com.*, 2 Metc. (Ky.) 17; *Newton v. State*, 21 Fla. 53; *Ballard v. State*, 19 Neb. 609; *Ray v. Ray*, 98 N. C. 566; *State v. Ginger*, 80 Ia. 577; *Russ v. Wabash West. Ry. Co.*, 112 Mo. 45.

have a tendency to mislead them.¹ But a party seeking an opinion from an expert witness may assume in his hypothetical question such facts as he deems proved by the evidence.² The proper purpose of a hypothetical question is to obtain the opinion of one entitled by experience to speak and express an opinion upon a state of facts, which for the purpose of his consideration are to be received by him as true.³ And it is not essential that the evidence as to the facts assumed to be proven should be uncontradicted.⁴ The counsel may assume any state of facts which the evidence tends to establish, and may vary the questions so as to cover and present the different theories. But there must be evidence in the case tending to establish all the facts stated in the question.⁵ Concerning this the Supreme Court of Wisconsin has said: "The rule in that respect must be that in propounding a hypothetical question to the expert, the party may assume as proved all facts which the evidence in the case tends to prove, and the court ought not to reject the question on the ground that in his opinion such facts are not established by the preponderance of evidence. What facts are proved in the case, when there is evidence to prove them, is a question for the jury and not for the court. The party has the right to the opinion of the expert witness on the facts which he claims to be the facts of the case, if there be evidence in the case tending to establish such claimed facts, and the trial judge ought not to reject the question because he may think such facts are not sufficiently established."⁶ If the facts assumed are not found established by the jury, then the opinion will be deprived of all weight in the case;⁷ but if they are found, then appropriate effect will necessarily be awarded to it, and the opinion given will aid the jury in solving the controversy.⁸ In the charge to the jury in a recent case the court said: "If

¹ *Williams v. Brown*, 28 Ohio St. 547. See also opinion of STAPLES, J., in *Dejarnette v. Com.*, 75 Va. 867, 875.

² *Rogers, Exp. Testimony* (1st Ed.), 39; *Tiler v. N. Y. C. R. R. Co.*, 49 N. Y. 142; *Louisville, etc., Ry. Co. v. Falvey*, 104 Ind. 409; *Goodwin v. State*, 96 Ind. 550; *Guertig v. State*, 66 Ind. 94; *Nave v. Tucker*, 70 Ind. 15.

³ *Girard Coal Co. v. Wiggins*, 52 Ill. App. 69.

⁴ *Jackson v. Burnham* (Colo.), 39 Pac. 577.

⁵ *Russ v. Wabash West. R. Co.*, 112 Mo. 45; 18 L. R. A. 828.

⁶ *Quinn v. Higgins*, 63 Wis. 664. And see *People v. Harris*, 136 N. Y. 423.

⁷ *In re Will of Norman*, 72 Id. 89; *Russ v. Wabash West. Ry. Co.*, 112 Mo. 45.

⁸ *Dolz v. Morris*, 10 Hun, 201.

the facts stated as a basis for the hypothetical question propounded to the medical experts in this case were not substantially correct, as shown by the evidence introduced on the trial of the case, then the opinion given by the experts based upon such assumed state of facts is entitled to but little or no weight as may be determined from the evidence." This was held erroneous and the case was reversed, because the jury might have understood that they were justified in giving some weight and force to the evidence of experts, even though they should find that such evidence was bottomed upon facts not proven.¹

Where a hypothetical question is put to a witness for his opinion, the question must be full enough to form a basis for an opinion. Where the question relates to the value of an animal, it must omit no important qualities of the animal affecting its value, about which there is no dispute, and which would necessarily influence an opinion.²

Where the opinion of an expert is offered, the court may hear evidence to ascertain first whether he is an expert.³ A witness cannot be permitted to give his opinion as an expert until it appears, by a preliminary examination, that he is a person of skill in the particular department or subject-matter in which his opinion is desired.⁴ A witness may not testify as an expert in medical matters without showing his standing as a physician.⁵

While it must appear that the witness has enjoyed some means of special knowledge or experience, no rule can be laid down as to the extent of it. Much depends upon the nature of the question with regard to which an opinion is asked. There are some matters of which every man with ordinary opportunities for observation is able to form a reliable opinion.⁶ It is not necessary to call a drover or butcher to ascertain the value of a cow.⁷ One who has knowledge on the subject is

¹ Hall v. Rankin, 87 Ia. 261.

² Chicago, M. & St. P. Co. v. Kendall, 49 Ill. App. 398.

³ Mendham's Case, 6 Rand. 704.

⁴ Hills v. Home Ins. Co., 129 Mass. 345; Heald v. Thing, 45 Me. 392; New Jersey Traction Co. v. Brabban, 32 Atl. 217.

⁵ Polk v. State, 36 Ark. 117. A physician showing himself otherwise competent, is not incompetent because not in practice at the time of the occurrence to which he testifies. Roberts v. Johnson, 58 N. Y. 613.

⁶ Wilkinson v. Moseley, 30 Ala. 562. ⁷ Ohio Rd. Co. v. Irwin, 27 Ill. 178.

competent to testify as to the effect the construction of a proposed improvement would have on the market value of property.¹ An expert has been defined to be one who has made the subject upon which he gives his opinion a matter of particular study, practice, or observation, and who has particular and special knowledge on the subject.² He is (as is signified in the derivation of the word itself) one instructed by experience. To become an expert requires a course of previous habit and practice, or of study, so as to be familiar with the subject.³ Concerning the character of certain stains, one may testify as an expert though he has abandoned his studies as a chemist and has devoted himself to the business of a druggist.⁴

The question whether a witness is an expert is for the decision of the court.⁵ And such decision is conclusive unless it appears upon the evidence to have been erroneous, or to have been founded upon some error in law.⁶ The court will not reverse either on account of the admission or the rejection of such evidence except in a clear and strong case.⁷ It may be shown that the *personal experience* of the witness has peculiarly fitted him to testify as an expert concerning the matter in dispute. In an action for personal injury it was a controverted question whether or not the plaintiff was paralyzed in her left arm or leg, and a physician of thirty years' standing introduced by the plaintiff was allowed to testify: "I am paralyzed on the left side—my arm and leg; have no practical use of them, but I can move the leg along." The opinion was delivered by Mr. Justice Sheldon, who said: "It is true that the witness's paralysis was not within the issue, and yet it was not a wholly unimportant fact. It tended to add strength to the witness' testimony as an expert, in being calculated to excite in him a

¹ Pike v. Chicago (Ill.), 40 N. E. 567.

² Mr. Justice DOB, in Jones v. Tucker, 41 N. H. 547. See also Dale v. Johnson, 50 N. H. 452.

³ Carter v. Bochins, 1 Smith's Lead. Cases, 286, n.; Nelson v. Sun Mutual Ins. Co., 71 N. Y. 459; Dickinson v. Fitchburg, 18 Gray, 546. And see Van der Donckt v. Thellessen, 8 M. G. & S. 812; Bird v. State, 21 Grat. 800; Bemis v. Rd. Co., 58 Vt. 686.

⁴ Haas v. Green (C. P.), 57 N. Y. S. R. 545.

⁵ Ardesco Oil Co. v. Gilson, 63 Pa. St. 146; Hills v. Home Ins. Co., 129 Mass. 345; Howard v. City of Providence, 6 R. I. 514; State v. Cole, 94 N. C. 598.

⁶ Perkins v. Stickney, 182 Mass. 217.

⁷ Long v. First German Congregation, 68 Pa. St. 156.

peculiar interest, and lead him to give a special study to that subject of inquiry.”¹

A physician testifying as to the condition of a patient, may base his opinion partly on declarations made to him by the patient, which he may relate to the jury.² The opinion of an expert as to the sanity of a party, founded upon a personal examination of, and acquaintance with, the party is admissible.³ And while neither books of established reputation, nor statistics—for example, of the increase of insanity—can be read to the jury,⁴ yet medical witnesses may give opinions upon information derived from books, not being confined to the results of their observation and experience.⁵

On this subject, Mr. Justice Campbell, of the Supreme Court of Michigan, made the following clear, explanatory observations: “No one has any title to respect as an expert, or has any right to give an opinion on the stand, unless as his own opinion; and if he has not given the subject involved such careful and discriminating study as has resulted in the formation of a definite opinion, he has no business to give it. Such an opinion can only be safely formed or expressed by persons who have made the scientific questions involved matters of definite and intelligent study, and who have by such application made up their own minds. In doing so it is their business to resort to such aids of reading and study as they have reason to believe contain the information they need. This will naturally include the literature of the subject. But if they have not taken trouble enough to find, or suppose they find, that certain authors say certain things without further satisfying themselves how reliable such statements are, their own opinion must be of very moderate value, and whether correct or incorrect, cannot be fortified before a jury by statement of what those authors hold on the subject. The jury are only concerned to know what the witness thinks, and what capacity and judgment he shows, to make his opinions worthy of respect. If the opinion of an author could be received at all,

¹ Chicago, etc., *R. Co. v. Lambert*, 119 Ill. 256.

² *State v. Gedicke*, 43 N. J. L. 86.

³ *Boardman v. Woodman*, 47 N. H. 120; *People v. Lake*, 12 N. Y. 358.

⁴ *Melvin v. Easby*, 1 Jones' L. 386; *Com. v. Wilson*, 1 Gray, 337. See 1 Greenl. Ev.

⁵ *State v. Terrell*, 12 Rich. L. 321; *State v. Wood*, 53 N. H. 484; *Link v. Sheldon*, 186 N. Y. 1.

it should be from his own words, not in single passages, but in combination ; and this, as has been heretofore held, cannot be done. It is excluded chiefly as both unknown as to value and as hearsay, and an attempt to swear to his doctrines orally would be hearsay still further removed, besides involving the other difficulty of needing interpretation and responsibility.”¹

But it must be shown upon what the expert founds his opinion.² Even in cases where experts are called upon to give an opinion based upon their personal observation, the facts upon which the opinion is founded must be stated. Otherwise the witness might be giving an opinion which would have great weight with the jury upon a state of facts very different from those found by them in the case on trial.³ And so in an action for the value of services, where the witness knows nothing of the character of the case, nor of the amount or character of the services rendered, he may not be asked, “From what you know of the case what do you think would be a fair amount for” the services?⁴

SECTION II.

The Value of Expert Testimony.

In many countries this kind of testimony, technically termed *expertise*, is invested with a sort of semi-official authority, and special rules are laid down for the estimation of its proving force.⁵ Neither in England, however, nor in this country is any peculiar authority given to the testimony of witnesses of this description ; its value is estimated by the same general principles as are applied in estimating the capacity, credit, and weight of all other witnesses,⁶ and the courts have wisely repelled all attempts to depart from the established and ordinary rules of evidence and judgment. The opinions of experts are advisory only and are not conclusive upon the

¹ *People v. Millard*, 53 Mich. 63.

² *Polk v. State*, 36 Ark. 117 ; *Price v. Richmond & D. R. Co.*, 38 S. C. 199.

³ *Hitchcock v. Burgett*, 38 Mich. 501.

⁴ *Williams v. Brown*, 38 Ohio St. 547.

⁵ *Mittermaier, ut supra*, c. 126 *et seq.*

⁶ *Best's Prin. of Ev.* 385 *et seq.* ; *State v. Miller*, 9 Houst. 564.

jury.¹ They are to be considered by the jury in connection with all the other evidence in the case; and the jury are not bound to act upon them to the exclusion of other testimony.²

It is scarcely necessary to add that scientific evidence being generally matter of opinion, can seldom be implicitly adopted. Lord Cottenham said he had seen enough of professional opinions to be aware that in matters of doubt, upon which the best constructed and best informed minds may differ, there is no difficulty in procuring opinions on either side.³

A learned writer on the Law of Scotland observes, that "there is perhaps no kind of testimony more subject to bias in favor of the adducer than that of skilled witnesses; for many men, who would not willingly misstate a simple fact, can accommodate their opinions to the wishes of their employers, and the connection between them tends to warp the judgment of the witnesses without their being conscious of it; and hence skilled witnesses, in questions of handwriting, can usually be got in equal numbers on either side; and engineers are more frequently like counsel for their employers than like witnesses giving their real opinions on oath."⁴

And a learned judge of the New York Court of Appeals, after quoting the language of Lord Campbell referred to in the note to the preceding paragraph, made the following remarks: "Without indorsing this strong language, which is, however, countenanced by the utterances of other judges and of some text-writers, and believing that opinion evidence is, in many cases, essential to the administration of justice, yet we think it should not be much encouraged, and should be received only in cases of necessity. Better results will generally be reached by taking the impartial, unbiased judgments of twelve jurors of common sense and common experience than can be obtained by taking the opinions of experts, if not generally hired, at least friendly, whose opinions cannot fail generally to be warped by a desire to promote the cause in which they are enlisted."⁵ Undoubtedly many discreditable exhibitions have taken place in our

¹ Moore v. Ellis, 89 Wis. 108.

² Guetiz v. State, 66 Ind. 94.

³ Dyce Sombre's Case, 1 M'N. & Gord. 128.

⁴ 2 Dickson on the L. of Ev. *ut supra*, 996; and see the language of Lord CAMPBELL in the Tracey Peerage, 10 C. & F. 191. See also the remarks of Judge TAYLOR, Taylor's Ev. § 58.

⁵ Ferguson v. Hubbell, 97 N. Y. 507.

courts of justice; nor is it possible to restrict the foregoing reproaches to witnesses taken from the particular professions which have been enumerated. Happily, however, such cases are but exceptional; and true scientific knowledge, under the government of high principle, is of the greatest value, as subsidiary to the ends of justice.¹ And it has been held an invasion of the province of the jury to charge that common experience has shown that the opinions of experts upon questions of insanity have become of little practical value.²

And evidence of scientific persons, on a capital trial, as to any distinction brought out by scientific investigation, between the appearance of stains of human blood and those of the blood of animals, is admissible.³ The subject is one which has received much attention at the hands of men qualified to discuss it; and it is important because of the number of cases in which the strength of the prosecution lies mainly in testimony as to the character of blood-stains.⁴

Some valuable remarks upon this kind of evidence were made by Lord Chief Justice Cockburn, upon a trial for murder, at Taunton Spring Assizes, 1857. The murder was effected by cutting the throat. A knife was found on the person of the prisoner, with stains of blood upon it; and it was contended that the murder had been effected with this weapon, while it was alleged on the part of the prisoner that it had been used for cutting raw beef. A professional analyst called on the part of the prosecution stated that the blood had not coagulated till it was on the knife, that the knife had been immersed in *living* blood up to the hilt, and that it was not the blood of an ox, a sheep, or a pig. His opinion was grounded upon the relative sizes of the globules of blood in man and other animals, that of man being stated to be 1-3400th of an inch, of the ox 1-5300th, of the sheep 1-5200th, and of the pig 1-4500th, the relative sizes being as 53 to 34 in the ox, 52 to 34 in the sheep, and 45 to 34 in the pig. The learned judge said, "The witness had said the blood on the knife could not be the blood of an animal as stated by the prisoner, and took upon himself to say that it was not

¹ On the subject of scientific evidence in cases of poisoning and of infanticide, see *infra*.

² *Burney v. Torrey*, 100 Ala. 157.

³ *State v. Knights*, 43 Me. 11.

⁴ I have seen it stated on good authority, that in a recent year fifteen cases of this kind arose in and about the city of New York alone.

the blood of a dead animal; that it was living blood, and that it was human blood, and he had shown them the marvellous powers of the modern microscope. At the same time, admitting the great advantages of science, they were coming to great niceties indeed when they speculated upon things almost beyond perception, and he would advise the jury not to convict on this scientific speculation alone." The case was conclusive on the general evidence.¹

Owing to the minute character of the measurements, and the fact that they are capable of being disturbed and rendered erroneous by very slight influences, the question of deciding whether a stain was produced by the blood of a human being or of an animal, is one attended with the highest difficulty. It seems safe to say that by no means which has yet been discovered can this question be determined, in all cases, with absolute certainty. While it is claimed that recent discoveries have greatly lessened the doubtful quality of testimony in such cases,² the inherent difficulties are so great that the evidence ought in every case to be received with caution and given to the jury with the most careful instructions.³ Undoubtedly, as bearing on this point, the nature of the investigation and the learning and skill of the expert may be considered.⁴

The remarks of Lord Chief Justice Cockburn are fittingly supplemented by some observations of Finch, J., in a recent case in New York. The prisoner claimed that blood-stains on the clothing and shoes which he wore on the day of the homicide were caused by the drippings of the blood of animals in a market in which he was in the habit of playing. The expert called by the prosecution refused to swear positively that the stains were human blood. The learned judge doubted "if any scientific ability could surely and with absolute certainty distinguish between the blood corpuscles of man and of some animals under all circumstances; and considered that confidence was rather strengthened in the opinion which the expert witness had expressed, by the fact that he refused to

¹ Reg. v. Nation, Taylor's Med. Jour. 279.

² 6 Chic. Law Journal, 114.

³ For a clear idea of the difficulties attending the identification of human blood, the reader should consult a valuable article by Dr. Marshall D. Ewell, in 10 Med.-Leg. Journal, 175, entitled "A Micrometric Study of Blood-Corpuscles."

⁴ State v. Miller, 9 Houst. 564; People v. Smith (Cal.), 39 Pac. 40.

turn it into a positive assertion, and left it to stand as his judgment, that the uniformity in size, corresponding with that of human blood corpuscles, which characterized the stains examined, indicated that the latter were not caused by the blood of other animals." The probability that the stains were occasioned by human blood was greatly augmented when the testimony of the expert was considered in connection with the other proof.¹

An interesting case is one cited in a work on Medical Microscopy, by Dr. Joseph G. Richardson. "A female child, nine years of age, was found lying on the ground on a small plantation, quite dead from a wound in the throat. Suspicion fell upon the mother of the girl, who, upon being taken into custody, behaved with the utmost coolness and admitted having taken her child to the plantation where the body was found, whence the child was lost while going in quest of flowers. There was found in the woman's possession a large knife, which was submitted to a careful examination. Nothing was found upon it, however, with the exception of a few pieces of hair adhering to the handle so small as to be scarcely visible. The examination being conducted in the presence of the prisoner, and the officer remarking: 'Here is a bit of fur or hair on the handle of your knife,' the woman replied: 'Yes, I dare say there is, and very likely some stains of blood, for as I came home I found a rabbit caught in a snare, and cut his throat with the knife.' The knife was sent to London, and, with the particles of hair, submitted to a microscopic examination. No trace of blood could at first be detected upon the weapon, which appeared to have been washed; but upon separating the horn handle from the shaft, it was found that a fluid had penetrated into the socket which was found to be blood, certainly not the blood of a rabbit, but bearing a resemblance to that of a human body. The hair was then submitted to examination. This hair was found by the microscopist to be that of a squirrel, and round the neck of the child at the time of the murder there was a tippet of squirrels' fur." The prisoner was convicted, and before being executed confessed her crime.²

In *Rubenstein's Case*, blood was found on the defendant's clothes, and the explanation was that it was hens' blood. An

¹ *People v. Johnson*, 140 N. Y. 350.

² See 15 Am. & Eng. Encyc. of Law, where this case is cited.

expert, however, found the blood to be that of a mammal. There were also found in the blood-spots pieces of corn-husks, and minute particles of earth which was identified as the same as that of the corn-field in which the murder was committed.¹

The views of Mr. Justice Stephen are always entitled to the greatest consideration, and some remarks of his bearing on the general subject under discussion are most appropriate here. Speaking of the law with reference to the defence of insanity, he says: "The importance of the whole discussion as to the precise terms in which the legal doctrine on this subject are to be stated may easily be exaggerated as long as the law is administered by juries. I do not believe it possible for a person who has not given long-sustained attention to the subject to enter into the various controversies which relate to it, and the result is that juries do not understand the summings up which aim at anything elaborate or novel. The impression made on my mind by hearing many—some most distinguished—judges sum up to juries in cases of insanity, and by watching the juries to whom I have myself summed up on such occasions, is that they care very little for generalities. In my experience they are usually reluctant to convict if they look upon the act itself as, upon the whole, a mad one, and to acquit if they think it was an ordinary crime. But their decision between madness and crime turns much more upon the particular circumstances of the case, and the common meaning of words, than upon the theories, legal or medical, which are put before them. It is questionable to me whether a more elaborate inquiry would produce more substantial justice."²

The following cases are remarkable as exemplifying the inconclusiveness of scientific evidence, when uncorroborated by conclusive facts, physical or moral:

A young man was tried for the murder of his brother, who resided with their father and overlooked his farm. The prisoner, who lived about twenty miles from his father's house, went on a visit to him, and on the day after his arrival his brother was found dead in the stable, not far from a vicious mare, with her traces upon his arm and shoulders; two other horses were in the stable, but they had their traces on. Suspicion fell upon the prisoner, who was on ill terms with his

¹ See article by Dr. Piper in 19 Am. L. Reg. (U. S.) at p. 605.

² 2 Steph. Dig. Crim. Law, p. 185, quoted in *State v. Maier*, 36 W. Va. 757.

brother, and the question was whether the deceased had been killed with a spade, or by kicks from the mare. The spade was bloody, but it had been inadvertently used by a boy in cleaning the stable ; and the cause of death could only be determined by the character of the wounds. There were two straight incised wounds on the left side of the head, one about five and the other about two inches long, which had apparently been inflicted by an obtuse instrument. On the right side of the head there were three irregular wounds, two of them about four inches in length, partaking of the appearance both of lacerated and incised wounds. There was also a wound on the back part of the head, about two inches and a half long. There was no tumefaction around any of the wounds, the integuments adhering firmly to the bones ; and, except where the wounds were inflicted, the fracture of the skull was general throughout the right side, and extended along the back of the head toward the left side, and a small part of the temporal bone came away. The deceased was found with his hat on, which was bruised, but not cut, and there were no wounds on any other part of the body. Two surgeons expressed a positive opinion that the wounds could not have been inflicted by kicks from a horse, grounding that opinion principally on the distinctness of the wounds, the absence of contusion, the firm adherence of the integuments, and the straight lateral direction and similarity of the wounds ; whereas, as they stated, the deceased would have fallen from the first blow if he had been standing, and if lying down, the wounds would have been perpendicular ; and, moreover, they were of opinion that the wounds could not have been inflicted if the hat had been on the deceased's head without cutting the hat, and that he could not have put on his hat after receiving any of the wounds. The learned judge, however, stated that he remembered a trial at the Old Bailey where it had been proved that a cut and a fracture had been received without having cut the hat ; and evidence was adduced of the infliction of a similar wound by a kick without cutting the hat. The prisoner was acquitted.¹

A murder was alleged to have been committed with a shovel, and discolored spots were found on the shovel, and also on the clothes of the deceased. These were subjected to chemical analysis and microscopic examination by different experts.

¹ *Rex v. Booth*, Warwick Spring Assizes, 1806, coram Mr. Baron Wood.

Some of those succeeded in finding well-defined blood corpuscles indicating human blood, others failed to find them. It was instructed on the part of the accused that human blood could not be distinguished from that of many animals by any chemical test or scientific appliance. In answer to this the court said substantially that if scientific research gave no such aid in the discovery of a heinous crime, it was deplorable. Nevertheless, he charged that if the jury was satisfied of its truth, they might lawfully convict, upon proof of the existence of human blood, by the testimony of unlearned observers. And this was approved by the Supreme Court.¹

A woman who was tried for the murder of her mother had lived for nine or ten years as housekeeper to an elderly gentleman, who was paralyzed and helpless; the only other inmate being another female servant, who slept on a sofa in his bedroom to attend upon him. The deceased occasionally visited her daughter at her master's house, and sometimes stopped all night, sleeping on a sofa in the kitchen. She came to see her daughter about eight o'clock one night, in December, 1848; the other servant retired to bed about half-past nine, leaving the prisoner and her mother in the kitchen, and she afterwards heard the prisoner close the door at the foot of the stairs, which was usually left open that they might hear their master if he wanted assistance. About two o'clock in the morning she was aroused by the smell of fire and a sense of suffocation, and found the bedroom full of smoke; upon which she ran downstairs, the door at the bottom of which was still closed. As she went downstairs she saw a light in the yard, and she found the kitchen full of smoke, and very wet, particularly near the fireplace, as also was the sofa, but there was very little fire in the grate. She then unfastened the front door, and ran out to fetch her master's nephew, who lived near, and who, after ascertaining that his uncle was safe, went into the kitchen, and threw some water on the sofa, which was on fire. The prisoner then drank to intoxication from a bottle of rum, and laid herself down on the sofa. The pillows and entire back part of the sofa-cover were burnt to the breadth of the shoulders. The remains of the deceased were found lying across the steps of the brew-house, and on the back of the head lay a piece of the sofa-cover, and near the body was

¹ *MLain v. Com.*, 99 Pa. St. 86.

a cotton bag besmeared with oil, which had been used indiscriminately as a bag or pillow. Near the feet of the body there were four pairs of sheets, which had been in the kitchen the night before, wet and almost entirely consumed. The prisoner's clothes were on a chair in the kitchen, and it appeared from the state of the bed-clothes that she had not been in bed. A butter-boat, which had been full of dripping, and a pint bottle, which had been nearly full of lamp-oil, and left near the fire over night, were both empty, and there were spots of grease and oil on the pillowcase, sheets, and sofa. A stocking had been hung up to cover a crevice in the window-shutter, through which any person outside might have seen into the kitchen. The door-post of the kitchen leading into the yard was much burnt about three feet high from the ground; and there was a mark of burning on the door-post of the brew-house. The surface of the body was completely charred, the tongue was livid and swollen, and one of the toes was much bruised, as if it had been trodden on. There was a small blister on the inside of the right leg, far below where the great burning commenced, which contained straw-colored *serum*, but there was no other blister on any part of the body, nor any marks of redness around the blister, or at the parts where the injured and uninjured tissues joined. The nose, which had been a very prominent organ during life, was flattened down so as not to rise more than the eighth of an inch above the level of the face, and as it never recovered its original appearance, it was stated that it must have been so flattened for some time before death. The lungs and brain were much congested, and a quantity of black blood was found in the right auricle of the heart. From these facts the medical witnesses examined in support of the prosecution concluded that the deceased had been first suffocated by pressing something over her mouth and nostrils so forcibly as to break and flatten the nose in the way described; but they had made no examination of the larynx and trachea, and other parts of the body. A physician, who had heard the evidence but not seen the deceased, gave his opinion that the appearances described by the other witnesses were signs of death by suffocation; that the absence of vesication and of the line of redness were certain signs that the body had been burnt after death; but he added that, as there were no marks of external injury, an examina-

tion should have been made of the parts of the body above mentioned, in order to arrive at a satisfactory conclusion. Another medical witness thought it possible that suffocation might have been produced by the flames preventing the access of air to the lungs, while others again thought it impossible that such could have been the case, as no screams had been heard in the night, and they were also of opinion that if alive the deceased must have been in such intense agony that she could not, if she had been strong enough to walk from the kitchen to the brew-house, have refrained from screaming. One of these witnesses stated that he did not think it possible that the deceased, if alive, could have fallen in the position in which she was found, as her first impulse would have been to stretch out her arms to prevent a fall ; but, on the other hand, it was urged that it was not possible to judge of the acts of a person in the last agonies of death by the conduct of one in full life. Under the will of her grandfather the prisoner was entitled, in expectancy on the demise of her mother, to the sum of £200, and to the interest of the sum of £300, for her life. She had frequently cruelly beaten the old woman, threatened to shorten her days, bitterly reproached her for keeping her out of her property by living so long, and declared that she should never be happy so long as she was above ground, and she had once attempted to choke her by forcing a handkerchief down her throat, but was prevented from doing so by the other servant. The magistrates had been frequently appealed to, but they could only remonstrate, as the old woman would not appear against her unnatural daughter. The case set up on behalf of the prisoner was, that she was in bed, and perceiving a smell of fire, came downstairs, and finding the sofa on fire, fetched water and extinguished it, and that she knew nothing of her mother's death until she heard of it from others. It appeared that the old woman was generally very chilly, and in the habit of getting near the fire; that on two former occasions she had burned portions of her dress; that on another she had burned the corner of the sofa-cushion; that she used to smoke in bed, and light her pipe with lucifer matches, which she carried in a basket; and that on the night in question she had brought her pipe, which was found on the following morning in her basket. It was urged as the probable explanation of the position in which the body

was found, that, finding herself on fire, she must have proceeded to the brew-house, where she knew there was water, and leaned in her way there against the door-post, and that, feeling cold in the night, she had wrapped the sheets around her, and did not throw them off until she reached the yard. The prisoner, though accustomed to sleep upstairs, was in the habit of undressing in the kitchen, which was stated to be the reason why the stocking had been so placed as to prevent any person from seeing into the kitchen. Mr. Justice Patteson, in his charge to the jury, characterized the evidence of the medical practitioners who had examined the body as extremely unsatisfactory in consequence of the incompleteness of their examination; the opinion of the physician who had not seen the body was also, he said, very unsatisfactory, as substituting him for the jury; that he had only expressed his opinion as founded upon the facts stated by the other witnesses; that if he had seen the body himself, his views might have been materially different; that the other witnesses might have omitted to mention particulars which he might deem of the greatest importance, but on which they looked as of no significance; that, therefore, opinions expressed on such partial statements ought to be received with the greatest reluctance and suspicion; that he had always had a strong opinion against such evidence, as tending to encroach upon the proper duty of juries; and he recommended them to exercise their own judgment upon the other evidence in the case, without yielding it implicitly to the authority of this witness. The jury acquitted the prisoner; and indeed it would have been contrary to all principle to do otherwise, in the midst of so much uncertainty as to the *corpus delicti*.¹

In a Maryland case commented on in a recent legal publication, one, Mrs. F., was charged with having given her husband strychnine, from the effects of which he died in convulsions several hours later. The evidence introduced in the early stages of the trial seemed sufficient to justify a verdict of guilty. But subsequently many days were spent in the examination and cross-examination of expert witnesses. "Thence-

¹ Reg. v. Newton, Salop Spring Ass. 1850. Two former jurors, at the assizes in the preceding year, had been unable to agree, and had been discharged, a circumstance unparalleled, it is believed, in English jurisprudence.

forward the case became a sort of tournament between experts, protracted to an enormous length and unrivalled in personal bitterness. When they had finished, the most careful reader was at sea. They differed about everything; they flatly contradicted each other about every symptom of strychnine-poisoning; they even created a reasonable doubt as to whether it was ever possible in any case to say that a person had been killed with strychnine. As a result the prisoner was acquitted, and has ever since been regarded as a much persecuted woman.”¹

¹ The West Va. Bar (1895), 207.

DIVISION II.

EXTRINSIC AND MECHANICAL INculpATORY INDICATIONS.

INTRODUCTORY REMARKS.

INculpATORY circumstances of an extrinsic and mechanical nature are such as are derived from the physical peculiarities and characteristics of persons and things, from facts and objects which bear a relation to our corporeal nature, and are apparently independent of moral indications. Such facts are intimately related to, and, as it were, dovetail with, the *corpus delicti*; and they are the links which establish the connection between the guilty act and its invisible moral origin.

It rarely happens in practice that circumstantial proofs consist purely in mere natural and mechanical coincidences, unconnected with any of a moral nature and conclusive tendency. But—and happy it is for the interests of society—forcible injuries can seldom be perpetrated without leaving many and plain vestiges by which the guilty agent may be traced and detected.

There are no existing relations, natural or artificial, no occurrences or incidents in the course of nature or dealings of society, which may not constitute the materials of proof, and become important links in the chain of evidence.¹

It is impossible, therefore, even to classify, and still less to attempt an enumeration of, evidentiary facts of the kind in question, except in a very general way; but it may be interesting and instructive, by way of illustration, to advert to some of the principal heads of such evidence, and to some remark-

¹ Starkie on Evidence (10th Am. Ed.), 844.

able cases which have occurred in the records of our criminal jurisprudence. One important and admonitory result of such an enumeration will be to show that all such facts are unavoidably associated with attendant sources of error and fallacy.

The principal facts of circumstantial evidence, of an external character, relate to questions of identity, of person ; of things ; of handwriting ; and of time ; but there must necessarily be a number of isolated facts which admit of no specific classification.

CHAPTER I.

IDENTIFICATION OF PERSON.

IN the investigation of every allegation of legal crime, it is fundamentally requisite to establish, by direct or circumstantial evidence, the identity of the individual accused as the party who committed the imputed offence.

Identity may be, and indeed very often must be, proved by circumstantial evidence.¹ Any circumstance which is calculated to elucidate the transaction, and which tends to make the proposition at issue more or less probable, may be given in evidence. No matter how slight may be the inference of identity to be drawn from any single fact, it is admissible as a fragment of the material from which the deduction is to be made.² No definite line of demarcation can be drawn with regard to facts proximate and remote. The test is, do they tend to throw light upon the transaction?³ An objection on the ground of remoteness goes merely to the *effect* of the evidence.⁴ On an indictment for murder, where the prisoner was a white man, and several witnesses had sworn that the person who had done the shooting was a negro, a witness who had seen the prisoner a little while after the murder was allowed to testify that he at that time noticed, around the defendant's neck, a dark, greasy appearance, as of blacking poorly washed off. There was much other contradictory evidence in the case, but the defendant was convicted.⁵

It might be concluded, by persons not conversant with judicial proceedings, that identification is seldom attended with serious difficulty, but such is not the case. Illustrations are

¹ *Rooker v. Rooker*, 12 W. R. 807.

² *Whart. Cr. Ev.* §§ 21, 24; *McCann v. State*, 18 Sm. & M. 471; *Johnson v. Com.*, 115 Pa. 369; 7 Cent. 608.

³ *Simms v. State*, 10 Tex. Crim. App. 181.

⁴ *State v. Chambers*, 45 La. Ann. 11 So. 944.

⁵ *Walker v. State*, 6 Tex. Crim. App. 576.

numerous to show that what are supposed to be the clearest intimations of the senses are sometimes fallacious and deceptive, and some extraordinary cases have occurred of mistaken personal identity.¹ Hence the particularity, and, as unreflecting persons too hastily conclude, the frivolous minuteness of inquiry, by professional advocates, as to the *causa scientiæ*, in cases of controverted identity, whether of persons or of things.

On a trial for the theft of certain municipal bonds of the city of Cincinnati a witness for the State testified that he had purchased the bonds from a person answering in general the personal appearance of the defendant. The defendant then introduced one V., who testified that at the time when the former witness said that he had purchased the bonds, V. was in the same city, and met on the street a person who was a stranger to him, but who so strongly resembled the defendant that he twice approached the person with the intention of addressing him, and did not discover the mistake till he had approached near enough to extend his hand for the purpose of shaking hands.²

Where one was indicted for adultery with S., a government witness, whose house was within 90 feet of the house of S., testified that frequently in the summer and fall of 1878, between eight and nine in the evening, she saw the defendant go to the house of S. and call her out and stand at the gate talking with her, and that once they walked towards the shipyard together. The defendant denied the truth of this, and to corroborate his statement and discredit the statement of the government witness, called another witness who lived nearer the house of the alleged paramour than the former witness, who was willing to testify that during the same summer and fall, in the evening, she had several times seen a man, who was not the defendant, call S. out and stand with her at the gate, and afterwards walk to the shipyard with her. This was excluded, but should have been admitted.³

Two men were convicted before Mr. Justice Grose of a

¹ *Rex v. Wood and Brown*, *ut supra*, 83; *Rex v. Coleman*, *ut supra*, 68. 82; *Reg. v. Markham*, sentenced to four years' penal servitude for uttering a forged check, O. B. 1856, but subsequently pardoned on the conviction of the real offender.

² *White v. Com.*, 80 Ky. 480.

³ *State v. Witham*, 72 Me. 531.

murder, and executed; and the identity of the prisoners was positively sworn to by a lady who was in company with the deceased at the time of the robbery and murder; but several years afterwards two men, who suffered for other crimes, confessed at the scaffold the commission of the murder for which these persons were executed.¹

A young man was tried at the Old Bailey, July, 1824, on five indictments for different acts of theft. It appeared that a person resembling the prisoner in size and general appearance had called at various shops in the metropolis for the purpose of looking at books, jewelry, and other articles, with the pretended intention of making purchases, but made off with the property placed before him while the shopkeepers were engaged in looking out other articles. In each of these cases the prisoner was positively identified by several persons, while in the majority of them an *alibi* was as clearly and positively established, and the young man was proved to be of orderly habits and irreproachable character, and under no temptation from want of money to resort to acts of dishonesty. Similar depredations on other tradesmen had been committed by a person resembling the prisoner, and those persons deposed that, though there was a considerable resemblance to the prisoner, he was not the person who had robbed them. He was convicted upon one indictment, but acquitted on all the others; and the judge and jurors who tried the last three cases expressed their conviction that the witnesses had been mistaken, and that the prosecutor had been robbed by another person resembling the prisoner. A pardon was immediately procured in respect of that charge on which the conviction had taken place.²

A few months before the last-mentioned case, a respectable young man was tried for a highway robbery committed at Bethnal Green, in which neighborhood both he and the prosecutor resided. The prosecutor swore positively that the prisoner was the man who robbed him of his watch. A young woman, to whom the prisoner paid his addresses, gave evidence which proved a complete *alibi*. The prosecutor was then ordered out of court, and in the interval another young man, who awaited his trial on a capital charge, was introduced and placed by the side of the prisoner. The prosecutor was again put

¹ Rex v. Clinch and Mackley, 3 P. & F. 144, and Sess. Pap., 1797.

² Rex v. Robinson, Old Bailey, Sessions Papers, 1824.

into the witness-box, and addressed by the prisoner's counsel thus: "Remember, the life of this young man depends upon your reply to the question I am about to put: Will you swear again that the young man at the bar is the person who assaulted and robbed you?" The witness turned his head toward the dock, when beholding two men so nearly alike, he dropped his hat, became speechless with astonishment for a time, and at length declined swearing to either. The prisoner was of course acquitted. The other young man was tried for another offence and executed, and before his death acknowledged that he had committed the robbery in question.¹ Upon a trial for burglary, where there was conflicting evidence as to the identity of the prisoner, Mr. Baron Bolland, after remarking upon the risk incurred in pronouncing on evidence of identity exposed to such doubt, said that when at the bar he had prosecuted a woman for child-stealing, tracing her by eleven witnesses buying ribbons and other articles at various places in London, and at last into a coach at Bishopsgate, whose evidence was contradicted by a host of other witnesses, and she was acquitted; and that he had afterwards prosecuted the very woman who really stole the child, and traced her by thirteen witnesses. "These contradictions," said the learned judge, "make one tremble at the consequences of relying on evidence of this nature, unsupported by other proof."²

As incidental to the establishment of identity, the quantity of light necessary to enable a witness to form a satisfactory opinion has occasionally become the subject of discussion. A man was tried in January, 1799, for shooting at three Bow Street officers, who, in consequence of several robberies having been committed near Hounslow, were employed to scour that neighborhood. They were attacked in a post-chaise by two persons on horseback, one of whom stationed himself at the head of the horses, and the other went to the side of the chaise. One of the officers stated that the night was dark, but that from the flash of the pistols he could distinctly see that one of the robbers rode a dark brown horse, between thirteen and fourteen hands high, of a very remarkable shape, having a square head and thick shoulders; that he could select him out of fifty horses, and had seen him since at a stable in Long

¹ 3 P. & F. 143; Amos' Great Oyer of Poisoning, 265.

² Rex v. Sawyer, Reading Ass.

Acre; and that he also perceived that the person at the side glass had on a rough shag great-coat.¹ Similar evidence was given on a trial for high treason;² and in a case of burglary before the Special Commission at York, January, 1813, a witness stated that a man came into his room in the night, and caused a light by striking on the stone floor with something like a sword, which produced a flash near his face, and enabled him to observe that his forehead and cheeks were blacked over in streaks, that he had on a dark-colored top coat and a dark-colored handkerchief, and was a large man, from which circumstances, and from his voice, he believed the prisoner to be the same man.³ In another case a gentleman who was shot at while driving home in his gig, and wounded in the elbow, stated that when he observed the flash of the gun, he saw that it was levelled towards him, and that the light enabled him to recognize at once the features of the accused. On cross-examination he stated that he was quite sure he could see him, and that he was not mistaken as to his identity; but the prisoner was acquitted.⁴

The liability to mistake must necessarily be greater where the question of identity is matter of deduction and inference, than where it is the subject of direct evidence. The law, recognizing this liability to mistake, has wisely provided that in questions of identity a witness may testify that he *believes* the person to be the same, that it is not necessary to swear positively. The degree of credit to be attached to the testimony is for the jury to determine.⁵ The circumstances from which identity may be thus inferred are innumerable, and admit of only a very general classification, of which the following are perhaps the most remarkable heads.

Family likeness has often been insisted upon as a reason for

¹ *Rex v. Haines*, 3 P. & F. 144.

² *Rex v. Byrne*, 18 St. Tr. 819.

³ *Rex v. Brook*, 31 St. Tr. 1135, 1137; but see "*Traité de la Preuve*," par Desquiron, 274, where it is stated that after the condemnation of a man for murder, on the testimony of two witnesses, who deposed that they recognized him by the light from the discharge of a gun, experiments were made, from which it appeared that such recognition was impossible.

⁴ *Reg. v. White*, Croydon Summer Assizes, 1839; *Taylor's Medical J.* 331 (4th Edition).

⁵ 1 Greenl. on Ev. § 440; *State v. Howard*, 118 Mo. 127; *Watson v. Brewster*, 1 Barr, 381; *Dodge v. Bacbe*, 57 Pa. St. 421; *Carmalt v. Post*, 8 Wright, 406; *People v. Williams*, 29 Hun, 520; *State v. Dickson*, 78 Mo. 438.

inferring parentage and identity. In the Douglas case Lord Mansfield said: "I have always considered likeness as an argument of a child's being the son of a parent; and the rather as the distinction between individuals in the human species is more discernible than in other animals; a man may survey ten thousand people before he sees two faces perfectly alike, and in an army of a hundred thousand men every one may be known from another. If there should be a likeness of feature, there may be a discriminancy of voice, a difference in the gestures, the smile, and other various things; whereas a family likeness runs generally through all these, for in everything there is a resemblance, as of features, size, attitude, and action."¹ But in a case in Scotland, where the question was who was the father of a certain woman, an allegation that she had a strong resemblance in the features of the face to one of the tenants of the alleged father, was held not to be relevant, as being too much a matter of fancy and loose opinion to form a material article of evidence;² and in another Scotch case, a trial for child-murder, it was permitted, after proof that the child had six toes, to ask a witness whether any members of the prisoner's family had supernumerary fingers and toes; though the inference to be deduced was evidently only a matter of opinion.³ In an early case in Maine, in bastardy proceedings, general evidence of resemblance of the child to the defendant was excluded, because mere matter of opinion; the object of the evidence not being to show color or any particular conformation.⁴

A case of capital conviction occurred some years ago where the prisoner had given his portrait to a youth, which enabled the police, after watching a month in London, to recognize and apprehend him;⁵ and photographic likenesses now frequently lead to the identification of offenders. A photograph of defendant taken shortly after his arrest was not long since permitted to be introduced for the purpose of identification, though he had in the meantime grown a beard.⁶ Witnesses

¹ Collectanea Juridica, 403; Beck's Medical Jurisprudence, 371. And see Report of the case of Doe dem. of Day v. Day, Huntington Assizes, July, 1793.

² Rutledge v. Carruthers, Tait's L. of Ev. 443.

³ Dickson's L. of Ev. *ut supra*, 14.

⁴ Keniston v. Rowe, 16 Me. 38.

⁵ Rex v. Arden, 8 London Med. Gaz. 36.

⁶ State v. Ellwood, 17 R. I. 763.

who had been present at the first marriage were shown the photograph of the bridegroom to enable them to identify the defendant on trial for bigamy.¹

It is well known that shepherds readily identify their sheep, however intermingled with others;² and offenders are not unfrequently recognized by the voice.³ The degree of certainty of identification by this method does not depend upon the ability of the witness to describe its peculiarities. It is for the jury only to determine how much reliance should be placed upon such testimony.⁴ To illustrate the value of such evidence some remarks made by Mr. Justice Sherwood on a trial for murder are subjoined. To support the defence, which was that of an *alibi*, a witness was examined who testified that about the time when the prisoner was said to have been having the altercation with the deceased, she heard him passing her house, some miles distant from the place of the crime. The court ruled out the testimony given by the witness as to the reason why she knew the person whose voice she heard to be the prisoner. And it was held that this was error. The learned judge, delivering the opinion of the court, said: "There is no reason why rules governing and relied upon by prudent and intelligent men in the transaction of the most important business of life should not be applied and made to govern in courts of justice in the trial of causes where life has been taken and is to be answered for."⁵ And it has been held proper on a trial for homicide to admit the evidence of a witness who testified that a few minutes after the commission of the crime he heard some one whose voice sounded like the defendant's say that he had killed a man.⁶

Circumstances frequently contribute to identification, by confining suspicion and limiting the range of inquiry to a class of persons; as where crimes have been committed by left-handed persons;⁷ or where, notwithstanding simulated appearances of

¹ Reg. v. Folsom, 4 F. & F. 108. As to the use of photography to assist in identification, see 1 Am. L. Reg. & Rev. (N. S.) 813; 31 Cent. L. J. 414.

² Rex v. Oliver, 1 Syme's Justiciary Rep. 224.

³ Rex v. Brook, 31 St. Tr. 1135; Com. v. McMahon, 145 Pa. St. 413; Cicero v. State, 54 Ga. 156; Johnson v. Com., 115 Pa. 389.

⁴ Com. v. Williams, 105 Mass. 62.

⁵ People v. Hare, 57 Mich. 505.

⁶ Deal v. State (Ind.), 39 N. E. 930.

⁷ Rex v. O'Kernan *et al.*, *ut supra*, 91; Rex v. Richardson, Rex v. Patch, *infra*.

external violence and infraction, the offenders must have been domestics; as in the case mentioned on a former page, of two persons convicted of murder, who created an alarm from within the house; but upon whom, nevertheless, suspicion fell, from the circumstance that the dew on the grass surrounding the house had not been disturbed on the morning of the murder, which must have been the case had it been committed by any other than inmates.¹ On the trial of a gentleman's valet for the murder of his master, it appeared that there were marks on the back door of the house, as if it had been broken into, but the force had been applied from within, and the only way by which this door could be approached from the back was over a wall covered with dust, which lay undisturbed, and over some tiling, so old and perished that it would not have borne the weight of a man; so that the appearance of burglarious entry must have been contrived by a domestic, and other facts conclusively fixed the prisoner as the murderer.² Where the evidence is purely circumstantial the jury may consider the fact that there is nothing tending to show that any other person committed or has been charged with the crime.³ Though it is not necessary to a conviction in any case to show that it was not in the power of any other person than the accused to commit the crime, it being sufficient to prove beyond a reasonable doubt that the accused was guilty.⁴

Identification is often satisfactorily inferred from the correspondence of fragments of garments, or of written or printed papers, or of other articles belonging to, or found in the possession of parties charged with crime, with other portions or fragments discovered at or near the scene of crime, or otherwise related to the *corpus delicti*.⁵ The admissibility of such evidence is too well settled to admit of controversy.⁶ On a trial for burglary a piece of wrapping paper was found where the culprits had stopped in the road near the house entered. This paper corresponded in quality with the paper in which a deck of cards, found in the prisoner's pocket when he was arrested,

¹ *Rex v. Jefferys and Swan, ut supra*; *Rex v. Schofield*, 31 St. Tr. 1061. And see *Mascardus, ut supra*, Concl. CCLXXII.

² *Reg. v. Courvoisier, infra*.

³ *Shepherd v. State*, 10 So. 668.

⁴ *Com. v. Leach*, 34 Cent. L. J. 429; 156 Mass. 99.

⁵ *Mascardus, ut supra*, Concl. DCCCXXXI.

⁶ *Meyers v. State*, 14 Tex. Crim. App.

was wrapped. It appeared that there had been a piece torn off of the paper which was around the cards, but it was not shown that the borders of the two pieces corresponded. There was, however, other evidence, which, together with this mentioned, made out a satisfactory case against the prisoner.¹ A woman who was tried for setting the prosecutor's ricks on fire had been met near the ricks, about two hours after midnight, and a tinder-box was found near the spot containing some unburnt cotton rag, as also a piece of a woman's neckerchief in one of the ricks where the fire had been extinguished. The piece of cotton in the tinder-box was examined with a lens, and the witness deposed that it was of the same fabric and pattern as a gown and some pieces of cotton print taken from the prisoner's box at her lodgings; that a neckerchief taken from a bundle belonging to the prisoner, found in her lodgings, corresponded with the color, pattern, and fabric of the piece found in the rick, and that they had both belonged to the same square; and from the breadth of the hemming, and the distance of the stitches on both pieces, as well as from the circumstance that both pieces were hemmed with black sewing silk of the same quality (whereas articles of that description are generally sewed with cotton), he clearly inferred that they were the work of the same person. The prisoner was capitally convicted, but there being reason to believe that she was of unsound mind, she was reprieved.²

There being evidence, on a trial for robbery, tending to show that defendants were the robbers, testimony of one who sold two men some articles of clothing two days before the robbery like those left by the robbers in the house was admitted.³ A man was connected with the robbery of a bank by the fragment of a key found in the lock of one of the safes, which an ironmonger proved that he had shortly before made for the prisoner,⁴ and a servant-man was identified with the larceny of a number of sovereigns by the discovery, in the lock of a bureau which had been broken open, of a small piece of steel which had formed part of the blade of a knife belong-

¹ Gregory v. State, 80 Ga. 603.

² Rex v. Hodges, Warwick Spring Assizes, 1818, coram Mr. Baron GABROW.

³ Com. v. Scott, 123 Mass. 222.

⁴ Rex v. Heath, Alison's Prin., *ut supra*, 318.

ing to him.¹ In a case of burglary the thief had gained admittance to the house by opening a window by means of a pen-knife, which was broken in the attempt, and part was left in the wooden frame; the broken knife was found in the pocket of the prisoner and perfectly corresponded with the fragment left.²

An attempt to murder, by sending to the prosecutor a parcel, consisting of a tin case containing several pounds of gunpowder, so packed as to explode by the ignition of detonating powder, enclosed between two pieces of paper, connected with a match fastened to the lid and bottom of the box, was brought home to the prisoner by the circumstance that underneath the outer covering of brown paper was found a portion of the "Leeds Intelligencer" of the 5th of July, 1832, the remaining portion of which identical paper was found in his house.³ In other cases identification has been established by the correspondence of the wadding of a pistol, which stuck in a wound, and was part of a ballad, which corresponded with another part found in the prisoner's possession,⁴ and by the like correspondence of the wadding of firearms with part of a newspaper of which the remainder was found in the possession of the prisoner.⁵ A murder had been committed by shooting deceased with a pistol, and the prisoner was connected with the transaction by proof that the wadding of the pistol was part of a letter belonging to the prisoner, the remainder of which was found upon his person.⁶ Where the defendant was charged with the murder of the deceased by shooting, one barrel of a gun found in his possession at the time of his arrest was loaded, and the other barrel empty, and paper and rags used as wadding in the loaded barrel corresponded with paper and rags blackened with powder found near the scene of the crime.⁷ One accused of a murder had, a few days before the commission of the crime, purchased shot at a store in the neighborhood corresponding in size to those found in the body of the deceased, and the shot was wrapped in brown paper of the same sort as the wadding found near the dead body.⁸

¹ Reg. v. Crump, Stafford Summ. Ass., 1851, coram Mr. Justice ERLE.

² Stark. on Ev. (10th Am. Ed.) 844.

³ Rex v. Mountford, Stafford Sum. Ass., 1835, 1 Moody's C. C. 441.

⁴ *Ex relatione* Lord ELDON, in 8 Hans. Parl. Deb. 1740, 8d ser.

⁵ Reg v. Courtneage, and others, *infra*.

⁶ See Stark. on Ev. (10th Am. Ed.) 844.

⁷ Hodge v. State, 98 Ala. 10.

⁸ Howard v. State, 8 Tex. Crim. App. 53.

On the evening of a homicide signs were discovered on the hearth in the prisoner's house of bullets having been recently moulded ; his gun had the appearance of having been recently fired ; a bullet was found in the tree near where the deceased fell, and another was found in his body. It was permitted to show that these bullets fitted a mould found on the person of the prisoner at the time of his arrest.¹ In another case the ball which had inflicted the fatal wound was of unusual size, and corresponded in weight with balls made for a gun traced to the defendant's possession.² A defendant, on trial for murder, was known to have been in the vicinity about the time of the commission of the crime, and a merchant was allowed to testify that cartridge shells found near the scene of the crime bore his private mark, and that cartridges of the same calibre had been purchased by the defendant a few days before. Where the defendant was shot from ambush, and cartridge hulls were picked up from the scene of the crime, and it was shown that they were of the same calibre as those shot by the defendant's gun, the defendant introduced his gun in evidence, and cartridge hulls fired from it during the time of the trial, to show that the hulls were struck by the plunger in his gun differently from the hulls which the prosecutor had put in evidence. On examination of the gun, however, it was found that the gun and the plunger had been recently tampered with, and fixed so as to strike the cartridges differently from those which had been used by the murderers. The discovery of this fact necessarily prejudiced the case of the defendant in the minds of the jury, and a conviction followed.³

A Spaniard was convicted of having occasioned a grievous injury to an officer of the post-office, by means of several packets containing fulminating powder, put by him into the post-office, one of which exploded in the act of stamping. The letters, which were in Spanish, and one of them subscribed with the prisoner's name, were addressed to persons at Havana and Matanzas, who appeared to be the objects of the writer's malignant intentions. There was no proof that the letters were in the prisoner's handwriting, but he was proved to have landed at Liverpool on the 20th of September, and to have put several letters into the post-office on the evening of the 22d,

¹ State v. Outerbridge, 82 N. C. 617.

² Dean v. Com., 82 Grat. 912.

³ Taylor v. Com., 90 Va. 109.

the explosion having occurred on the 24th; and there was found upon his person a seal which corresponded with the impression upon the letters, which circumstance (though there were other strong facts) was considered as conclusive of his guilt, and he was accordingly convicted and sentenced to two years' imprisonment.¹ On a trial for the forgery of a document, the impression of a seal attached to it corresponded with another impression upon a packet of papers produced in evidence by the prisoner, and both impressions were taken from a seal in the possession of a member of his family.²

On a trial for burning the prosecutor's house, it was shown that on the morning after the fire a place was found in the woods in front of the house where a horse had been fastened, and the horse's tracks led in the direction of the house where the prisoner was staying. And two postal cards addressed to the defendant were found on the ground near the place where the horse had stood. This latter circumstance was admissible, but was worth nothing unless it was shown that the cards had previously been in the possession of the defendant.³

On a trial for arson the fact that matches found near the burned building are of the same kind as those used in the defendant's house, is a circumstance of very little, if any, weight against the defendant, when the same kind is for sale in every store in the neighborhood and in use in many of the families.⁴

The offender is sometimes identified by means of wounds or marks inflicted upon his person. In a case of robbery it appeared that the prosecutor, when attacked, had, in his own defence, struck the robber with a key upon the face, and the prisoner bore an impression upon his face which corresponded with the wards of the key.⁵

And it has not infrequently happened that a question of doubt as to the identity of the defendant has been settled by the discovery on his person of permanent marks which were known to be on the person of the guilty party. For instance, a prisoner was compelled to exhibit his arm to the jury to show certain tattoo-marks which a witness had previously

¹ *Rex v. Palayo*, Liverpool Mids. Quarter Sess., 1886.

² *Rex v. Humphreys*, *infra*.

³ *King v. State*, 15 Lea, 51.

⁴ *People v. Kennedy*, 82 N. Y. 141.

⁵ See Stark on Ev. (10th Am. Ed.) 844.

testified were there.¹ In an early case in this country it was held that the prisoner could not be compelled to exhibit himself to the jury to enable them to determine his status as a free negro.² One ground of the decision was that a witness could not be compelled to furnish evidence against himself. But in the subsequent cases the courts have evinced a reluctance to follow the reasoning of the court in that case, and have carefully distinguished the facts in the respective cases. The decision was no doubt correct under the peculiar facts of that case. It has been said that too much meaning is attached to the words "compelled to make evidence against himself." In a case of homicide the defendant makes evidence against himself by being compelled to surrender the weapon with which the offence was committed. A burglar is forced to give evidence against himself when he is compelled to surrender false keys and other burglarious instruments found in his possession. A counterfeiter is compelled to give evidence against himself when the dies he has manufactured and used are discovered and brought into court for inspection.³

All instruments by which an offence is alleged to have been committed, all clothing of the parties concerned, and all materials connected with the crime, from which an inference of guilt or innocence may be drawn, may be produced at the trial and inspected by the jury.⁴ On a trial for murder where the mortal wound was shown to have been inflicted with a hatchet, identified by the evidence as found in the cabin where the body of the deceased was discovered, the hatchet was held to have been properly handed to the jury to be examined by them.⁵ A medical witness having testified that a wound which caused the death of the murdered man might have been inflicted with a blunt instrument, a picket was produced, which had been found upon the premises of the defendant, and which had on it blood and hair. It was shown that the hair was of the same color as the hair of the deceased.⁶ Where the evidence established that after a homicide the person of the

¹ *State v. Ah Chuey*, 14 Nev. 79.

² *State v. Jacobs*, 5 Jones, 259.

³ See opinion of the court in *State v. Ah Chuey*, *supra*.

⁴ See *State v. Cræmer* (Wash.), 40 Pac. 944; *State v. Tippet* (Ia.), 63 N. W. 445; *State v. Ferris*, 128 Mo. 447.

⁵ *McDonel v. State*, 18 Cent. L. J. 374.

⁶ *Terr. v. Egan*, 3 Dak. 119. See also *Taylor v. Com.*, 42 Leg. Int. 193; 6 Cr. L. Mag. 625.

deceased was stripped of its clothing, a rope or similar appliance was fixed about the neck, and the body dragged for several miles to a thicket where it was concealed, it was permitted to be shown that a rope was found in the house of the defendant which, from the marks and indications upon it, had evidently been used for some such purpose; and that a bundle of clothing was found concealed some distance from the body, though there was no positive testimony that the clothing had belonged to the deceased.¹

In one case, a trial for murder, an empty Winchester rifle-shell was found near the scene of the crime, stamped "W. R. A. Co.—W. C. F.—40-65." It appeared that the defendant owned a rifle carrying shells of this description; and this, in connection with threats and other circumstances, was held sufficient to justify conviction.² And in a trial for the murder of one who had evidently died from wounds in the head inflicted by a blunt instrument, a broken gun found lying near the body of the deceased was admitted in evidence.³

On a trial for robbery, it having been shown that one of the robbers had struck the president of the bank, which had been robbed, a severe blow with a pistol, it was allowed to be proved, as tending to establish the identity of the defendant, that when the defendant was arrested he was armed with a pistol, the ramrod of which was bent so that it touched the barrel.⁴ And where one was charged with assault with intent to murder, by shooting, a witness was allowed to testify that he had inserted his finger into the muzzle of the defendant's gun, and that when he withdrew his finger it was wet and black, from which, in his opinion, the gun must have been recently discharged.⁵ In a case where the accused was convicted of the murder of his wife, it was shown that the throat of the deceased had been cut from ear to ear, and that a knife belonging to the prisoner, stained with blood not yet dry, was found on a shelf in the pantry.⁶ Immediately after a homicide the accused was found with his hands covered with blood, and a knife in his pocket was smeared with it.⁷

¹ Hubby v. State, 8 Tex. Crim. App. 597.

² People v. Gibson 106 Cal. 458.

³ Ezell v. State (Ala.), 15 So. 818.

⁴ Reardon v. State, 4 Tex. Crim. App. 602.

⁵ Meyers v. State, 14 Tex. Crim. App. 35.

⁶ Greenfield v. People, 85 N. Y. 75.

⁷ Barbour v. Com., 9 Va. L. J. 309; 6 Crim. L. Mag. 624.

That articles of apparel covered with blood were found a short distance from the scene of the murder and a considerable time after the murder, may not be shown when there is nothing to connect the defendant with them.¹

In this connection it may be mentioned that the existence of blood-stains on the person or clothes of one accused of a crime involving the shedding of blood, may always be shown.²

"Stains of blood found upon the person or clothing of the party accused have always been recognized among the ordinary *indicia* of homicide. The practice of identifying them by circumstantial evidence and by the inspection of witnesses and jurors has the sanction of immemorial usage in all criminal tribunals. Proof of the character and appearance of the stains by those who saw them has always been regarded by the court as primary and legitimate evidence. * * * The degree of force to which it is entitled may depend upon a variety of circumstances to be considered and weighed by the jury in each particular case; but its competency is too well settled to be questioned in a court of justice."³

Witnesses not medical men may give their opinion as to whether certain spots were blood-spots.⁴ The testimony of the chemist who has analyzed blood, and that of the observer who has merely recognized it, belong to the same legal grade of evidence; and though the one may be entitled to much greater weight than the other, with the jury, the exclusion of either would be illegal.⁵ It may be shown that immediately after a homicide the hands of the defendant are covered with blood, without an analysis to establish the fact that the substance was blood.⁶

A charge was affirmed to be correct in which the trial court had said to the jury: "We cannot instruct you that because no analysis had been made of the substance which the witnesses supposed to be blood, no chemical test, no microscopic examination, that you are therefore to reject the evidence as insufficient to show that it was blood. We feel it to be our duty to refer the question to you, and leave it for you to say whether

¹ *State v. Thomas*, 12 S. W. 668.

² *Beavers v. State*, 58 Ind. 530.

³ PORTER, J., in *People v. Gonzalez*, 35 N. Y. 49.

⁴ *Greenfield v. People*, 85 N. Y. 75; *Thomas v. State*, 67 Ga. 460.

⁵ Remarks of PORTER, J., in *People v. Gonzalez*, 35 N. Y. 49.

⁶ *Barbour v. Com.*, 9 Crim. L. Mag. 624; 9 Va. L. J. 309.

the commonwealth has satisfied you beyond a reasonable doubt that the spots seen by the witnesses were blood.”¹

A man was recently convicted of murder entirely on the evidence of circumstances, one of the most prominent of which was the existence of spots on the accused's trousers, which were claimed to have been caused by the spattering of blood and brains from the wounds inflicted on the head of the deceased. One spot showed only on the outside of the cloth, but several spots were quite noticeable on the inside as well. The theory of the prosecution was that the defendant had failed to notice the first spot, but that he had attempted to wash off the others, and that the action of the water had forced the stain through the fabric.²

The impressions of shoes, or of shoe-nails, or of other articles of apparel, or of patches, abrasions, or other peculiarities therein, discovered in the soil or clay, or snow, at or near the scene of crime, recently after its commission, frequently lead to the identification and conviction of the guilty parties.³ The presumption founded on these circumstances has been appealed to by mankind in all ages, and in inquiries of every kind, and is so obviously the dictate of reason, if not of instinct, that it would be superfluous to dwell upon its importance.

The effect or sufficiency of the evidence in reference to correspondence of tracks discovered at or near the scene of a crime with those of the accused does not seem to be susceptible of being definitely stated. Mr. Wharton says that “the character of footprints leading to the scene of murder, and their correspondence with the defendant's feet, may be put in evidence in cases where the defendant's agency is disputed. Such evidence is not by itself of any independent strength, but is admissible with other proof as tending to make out a case.”⁴ Thus where the wife of the murdered man testified that the defendant did the killing, and her testimony was corroborated by tracks shown to have been made by the defendant and by spots of blood found on his clothing, this was held sufficient to con-

¹ *Gaines v. Com.*, 14 Wright, 819.

² *People v. Hand*, Mich. Circ. Ct. (Washtenaw Co.), January, 1894.

³ *Menochius*, *ut supra*, lib. v. præ. 81; *Mascardus*, *ut supra*, Concl. DCCCXX. pl. 11; *Traité de la Preuve*, par Mittermaier, *ut supra*, c. 57. And see *Young v. State*, 68 Ala. 569; *Hodge v. State*, 12 So. 164; 98 Ala. 10.

⁴ *Whart. Cr. Ev.* § 795.

vict, notwithstanding the facts testified to by the defendant's witnesses tended to prove an *alibi*.¹

On a trial for highway robbery, the boots of the prisoners were found to fit impressions in the soil at the place where the robbery had been committed. But it was held unsafe to convict on such evidence alone.² And on a trial for arson there were tracks leading to and from the vicinity of the barn burnt corresponding in size and dimensions with defendant's boots. But these, even if made by defendant, might have been made by him in going to and from one of his fields. The evidence was held insufficient to convict, especially in view of the friendly relations existing between the owner of the barn and the defendant, and the entire absence of evidence showing motive.³

Where the only evidence relied upon by the State to convict the accused was the correspondence of tracks discovered at or near the house where the offence was alleged to have been committed, and those made by him, the track in question was peculiar in this, that in consequence of a bent leg of the defendant, in walking, the heel of his right foot scarcely touched the ground. The opinion shows that there was conflict in the evidence for the State in reference to the tracks, and also that there was nothing to indicate that the accused made the assault with the intent to rob; but the view was expressed that the evidence of tracks alone was not sufficient to sustain a conviction.⁴ On trial of an indictment for arson, the witnesses testified that about 200 yards from the place where the house stood, they had discovered along a turn row in the ploughed ground, the track of a man wearing a No. 8 shoe, that "turned the toe on his left foot in a little, and dug up the ground with the toe of his right foot as he walked." They followed this track "a piece. Then it turned out, going around over ploughed ground to a magnolia tree standing about thirty yards from the corner of the burnt house." No tracks could be seen under or immediately around the tree, on account of leaves and trash. They saw some "barefoot or stocking-foot" tracks leading away from the tree towards the site of the burnt house, and leading up to where the corner of the building had

¹ *Williams v. State* (Tex. Crim. App.), 25 S. W. 629.

² *Reg. v. Britton*, 1 F. & F. 354.

³ *State v. Johnson*, 19 Ia. 280.

⁴ *Green v. State*, 17 Fla. 669.

been. They followed these tracks away from the site of the house over cultivated land for about 300 yards, to a place where an old fence had been on fire that morning, and there lost them. Here many people had been fighting fire that morning, and there were many shoe-tracks and barefoot tracks around where the fence was burned. The witnesses then went across a field and through a strip of woods. On the other side of the woods, about half a mile from where they left the barefoot track, they came across a man's shoe-track. They recognized it as the same track as they had seen in the ploughed ground from the peculiarities before mentioned. They followed this track till it struck a road, and then followed it down the road to the house of defendant, where they found defendant in his garden. As they were all leaving the garden, one of the witnesses observed the track made by the defendant, and recognized it as the same track he had seen near the burnt house and in the field. Now here there was no measurement of the tracks, or actual comparison by placing the shoes of the accused upon the impressions near the house or in the field. The witnesses arrived at the conclusion that the tracks were the same by observing the two tracks some distance apart. And it was held that the failure to measure the tracks, or to test them by actual comparison, together with the lack of other unusual characteristics than those mentioned, deprived them, standing alone, of the probative force given to tracks of marked peculiarities distinguishing them from others, when the correspondence has been verified by the test of actual comparison.¹

And very little weight is to be attached to evidence of foot-prints although they correspond in dimensions with the shoes worn by the person charged, unless it appears that there is about them some peculiarity which makes them more easily recognizable, and which renders less probable the supposition that they were made by some person other than the prisoner.² A judgment of conviction for arson founded on similarity of tracks made by the defendant with those found near the burned building was reversed because there was no peculiarity about the track.³

¹ Whetston v. State, 81 Fla. 240.

² People v. Newton, 8 N. Y. Crim. Rep. 406.

³ Shannon v. State, 57 Ga. 482. See also McDaniel v. State, 53 Ga. 253.

To identify the defendant as one who committed the theft of a horse, it having been shown that the one who led the horse from the stable wore a number six shoe, it was competent for a merchant to testify that he had sold the defendant shoes of that size. This evidence was said to be of very slight value, but its weight was for the jury.¹ Footprints made by one who had pursued the woman of whose murder the defendant was accused had been made by a shoe slightly run down at the heel; and such a shoe was found on the defendant.² In another case a circumstance which had much to do with the identification of the prisoner was a deformity of the left foot, the tracks made by the robber at the house robbed showing a similar deformity.³ On a murder trial the track found near the body of the deceased showed a turning-in of the right foot, and this corresponded with the peculiarity of the walk of the defendant.⁴

In a recent case it appeared that the tracks were of different sizes, but seemed to have been made by the same person, and it was shown that about the time of the offence the defendant wore "odd" shoes, that is, one shoe of one size, and another of a different size.⁵ In one case the peculiarity of the tracks was that they were very large.⁶ In another case, where the tracks led from the premises robbed to the defendant's yard, they had been made by a small foot, and it was shown that the defendant had such a foot.⁷

But, where the tracks made showed a strip of leather covering about half of the heel, and on the left heel of the prisoner's shoe was such a piece, this was held insufficient to support a conviction, even when taken in connection with the fact that the prisoner when asked to hold up his left foot had held up his right foot.⁸

If the State offers evidence to the effect that tracks around the scene of the crime were easily distinguished on account of some peculiarity—for example, "tack-prints"—and a conviction is had on such evidence, the judgment will be reversed if

¹ *State v. Reed*, 89 Mo. 168.

² *Preston v. State*, 8 Tex. Crim. App. 30. See also *McGill v. State*, 25 Tex. App. 499.

³ *Cooper v. State*, 88 Ala. 107.

⁴ *Schoolcraft v. People*, 117 Ill. 271.

⁵ *Whitfield v. State*, 25 Fla. 289.

⁶ *Griggs v. State*, 59 Ga. 738.

⁷ *State v. Grebe*, 17 Kan. 458.

⁸ *Prather v. Com.*, 10 Crim. L. Man. 890.

the court has refused to allow the defendant to show that he has never worn a shoe which could make a track presenting such a peculiarity.¹

To guard against error, it is manifest that the recency of the discovery and comparison of the impressions relatively to the time of the occurrence of the *corpus delicti*, and before other persons may have resorted to the spot, is of the highest importance.² But testimony as to the measure of footprints is competent though the measurement may not have been made till some time after the commission of the crime. This fact goes not to the competency, but to the weight of the evidence.³ Where a conviction rested upon tracks which were not shown to have been recent, and there was no peculiarity about the tracks, and the witnesses testified as to measurements made by others, the judgment was reversed.⁴

So, the accuracy of the comparison is obviously all-important,⁵ and therefore, as a further means of guarding against mistake, it is safer to require that the shoes should be compared with the footmarks before they are put on them;⁶ and where the comparison had not been previously made, Mr. Justice Park desired the jury to reject the whole inquiry relating to the identification by shoemarks.⁷ Where testimony has been given concerning footprints near the scene of the crime, it has been allowed to be shown that one of the witnesses had put on a boot taken from the defendant's foot, and applied it to a track which had been found there in a pile of soft dirt, which it fitted, and that he made other tracks with it which the witnesses examined and compared, and found them to correspond in size, shape, appearance and peculiarity with the former track and shape and size of the boot.

It is not necessary that a witness should be an expert to entitle him to testify as to the identification of tracks.⁸ The correspondence of the shoes of the prisoner with the tracks is matter of fact to which any witness observing it may testify.⁹

¹ *Stone v. State*, 12 Tex. Crim. App. 219.

² *McDaniel v. State*, 53 Ga. 253.

³ *People v. McCurdy*, 68 Cal. 576.

⁴ *McDaniel v. State*, 53 Ga. 253.

⁵ *Stone v. State*, *supra*; *Bouldin v. State*, *infra*.

⁶ *Rex v. Heaton*, 1 Lew. C. C. 116.

⁷ *Rex v. Shaw*, *Id*.

⁸ *State v. Morris*, 84 N. C. 756.

⁹ *Young v. State*, 68 Ala. 569; *Murphy v. People*, 68 N. Y. 590.

A witness, it is held, may testify as to the peculiarity of tracks made by the defendant, but may not testify that in his opinion or judgment certain tracks were made by the defendant.¹

He may be allowed to go no further than to state the facts of identification, and it is for the jury to find, from the facts deposed to, whether they are defendant's tracks or not.² But this rule is not universal. A witness for the State was allowed to testify that he measured tracks found at the place of the burglary, and that he examined the shoe the defendant had on immediately after the commission of the offence, and that upon placing the shoe in the track he found it to fit exactly.³ In another case, a State's witness was permitted to testify that two days after the robbery charged in the indictment he went to the scene of the crime and there examined the footprints round and about the spot, which tracks he described; that afterwards he was present attending the examining trial of the defendant, and noticed the boots of the defendant, and that, in his opinion, the tracks made at the place of the robbery were made by, and corresponded with, the boots of the defendant.⁴

It is not necessary that an examination of tracks and comparison with the measurements of the boots of the defendant be made in his presence.⁵

It has been held that a defendant cannot be compelled against his will to put his foot in a shoe-track that it may be used as evidence against him on the trial, when the person employing the force has no lawful warrant or authority for so doing.⁶ But a prisoner indicted for stealing corn from a field was compelled by the officer who arrested him to put his foot in the tracks found in the field, and the officer was allowed to testify to the resemblance.⁷ In a recent case, the accused and those of his kindred, who, it was said, made similar tracks,

¹ *Livingston v. State* (Ala.), 16 So. 801; *Riley v. State*, 88 Ala. 193; *Clough v. State*, 7 Neb. 820.

² *Busby v. State*, 77 Ala. 66; *Riley v. State*, 88 Ala. 193; *Hodge v. State*, 98 Ala. 10.

³ *McLain v. State*, 30 Tex. App. 482.

⁴ *Clark v. State*, 28 Tex. Crim. App. 189. See to the same effect *Thompson v. State*, 19 Tex. Crim. App. 594; *Crumes v. State*, 28 Tex. Crim. App. 516.

⁵ *State v. Morris*, 84 N. C. 756.

⁶ *Day v. State*, 63 Ga. 667.

⁷ *State v. Graham*, 74 N. C. 646.

voluntarily put their feet in sand before the jury, and the jury were enabled to see the peculiarity in the tracks which had been testified to by several witnesses as existing in the tracks traced from the house where the burglary charged was committed.¹

But it must not be overlooked that, even where the identity of footmarks has been established beyond all doubt, they may have been fabricated with the intention of diverting suspicion from the real offender, and fixing it upon an innocent party;² and that in other respects this kind of evidence may lead to erroneous interpretation and inference.³

It is proper for the prosecution to show that horse-tracks trailed from the scene of the crime correspond with those made by a horse found in the defendant's possession.⁴ It was shown in one case that shoes taken from the prisoner's horse fitted the tracks leading in the direction where the body of the deceased was found.⁵

In a case which occurred some years ago, a prisoner charged with arson had turned his horse's shoes round after arriving at the house, so as to create the appearance of two persons having proceeded to and from it; but the artifice was the means of detection, since the removal of the shoes was indicated by the recent marks of nails on the horse's foot, and afforded one of the most emphatic of the indications by which the prisoner's guilt was established.⁶

But evidence that horse-tracks leading from the scene of the crime correspond in size with those made by the defendant's horse is not sufficient evidence standing alone to convict the defendant. On a trial for arson the defendant was allowed to show that his barn stood open continually. It thus was possible that the horse might have been taken from the barn and ridden by a stranger without the knowledge of the defendant.⁷

Where, on a trial for murder, the principal circumstance relied on was a series of horse-tracks leading in the direction of the defendant's cabin, and the court would not allow de-

¹ Gregory v. State, 80 Ga. 269.

² See the case of François Mayenc, Gabriel, 403.

³ Rex v. Thornton, Rex v. Isaac Looker, *infra*.

⁴ Goldsmith v. State, 32 Tex. Crim. App. 112.

⁵ Campbell v. State, 23 Ala. 44.

⁶ Spooner's Case, 2 Chandler's Am. Crim. Tr.

⁷ State v. Manbrick, 65 Ia. 614.

fendant to give in evidence a comparison of the measure of his horse's foot and that found near the place of killing, the judgment was reversed.¹

The following cases illustrate the pertinency and weight of such mechanical facts, especially when connected with other concurring circumstances leading to the same result :

Where the defendant was accused of the theft of the body of a hog which he had previously killed, the head of a hog freshly killed was found and tracks led from it to the accused's house ; also a box containing fresh pork was found concealed, and the box was identified as belonging to the prisoner.² On a trial for larceny, in addition to the evidence of tracks, the defendant had been found in possession of several coins of the same kind as those stolen.³ Two were convicted of burglary on evidence which showed that, early in the morning after the burglary, footsteps were traced from the barber-shop burglarized to a vacant building near by in which the defendants were found asleep ; that goods taken from the shop were found concealed under sawdust within a few feet of where defendants were sleeping, that other goods taken from a store adjoining the barber-shop, which store had also been burglarized on the same occasion, were found concealed near the entrance of the vacant building beneath some old barrels ; that some chisels were found concealed in the building, one of which fitted the marks on the door of the barber-shop which had been forced open by the use of some hard instrument ; that within one or two days before the commission of the burglary one of the defendants inquired of a bootblack connected with the barber-shop how much money he was making and where he kept it, and that, the day after the burglary, one of the defendants was heard telling a younger brother to go to a spot where part of the goods were afterwards found, and see if they were still there.⁴

A farm laborer was tried for the murder of a young woman, a domestic servant, living in the same service. A little before seven in the evening she went on an errand to take some barm to a neighboring house, about 200 yards distant, but it not

¹ Bouldin v. State, 8 Tex. Crim. App. 332.

² Thompson v. State, 30 Tex. 356.

³ People v. McCallam, 3 N. Y. Cr. Rep. 189.

⁴ People v. Arthur, 98 Cal. 536.

being wanted, she did not leave it, and set out about seven o'clock on her way back. Being about to leave her situation that evening, she had requested the prisoner to carry her box to the gardener's house, about a quarter of a mile distant. Soon after she set out on her errand, the prisoner followed her, carrying her box, but did not reach the gardener's cottage until after eight. On the following morning she was found, lying on her back, drowned in a shallow pit near a footpath leading from her master's house to the gardener's cottage. There were marks of violence on her person, and one of her shoes and the jug in which she had carried the barm were found near the pit. Barm was also found spilt near the spot, and there were marks of much trampling; and chaff and grains of wheat were scattered about, which were material facts, the prisoner having been engaged the day before in threshing wheat. Impressions were found in the soil, which was stiff and retentive, of the knee of a man who had worn breeches made of striped corduroy, and patched with the same material, but the patch was not set on straight, the ribs of the patch meeting the hollows of the garment into which it had been inserted; which circumstance exactly corresponded with the prisoner's dress. The prisoner denied that he had seen the deceased after she left the house on her errand, and stated that he had been, in the interval before his arrival at the gardener's house, in company with an acquaintance whom he had met with on the road; but it was proved that the person referred to at the time in question was at work thirty miles off. He was convicted and executed.¹

A man was tried at Stafford Summer Assizes, 1844, for the murder of an elderly woman, the housekeeper of an old gentleman at Wednesbury, who, with a man-servant, were the only other inmates. Her master went from home on a Saturday morning, about half-past nine o'clock, as he was accustomed to do on that day of the week, leaving the deceased in the house alone. Upon his return, a quarter before two, he found her dead body in the brew-house, her throat having been cut, and the house robbed. The murder had probably been committed about a quarter past ten o'clock, as the butcher called at that time and was unable to obtain admittance, and about the same time a scream was heard. Traces were found of a man's right

¹ *Rex v. Brindley*, Warwick Spr. Ass., 1816.

and left footsteps leading from a stable in a small plantation near the front of the house, from which any person leaving the house by the front door could be seen ; and similar footsteps were found at the back of the house, leading from thence across a ploughed field for a considerable distance, in a sequestered direction, until they reached a canal bank, where they were lost on the hard ground. From the distance between the steps at the back of the house and in the ploughed field, the person whose footsteps they were must have been running ; the impressions were those of right and left boots, and were very distinct, there having been snow and rain, and the ground being very moist. The right footprints had the mark of a tip round the heel ; and the left footprints had the impression of a patch fastened to the sole with nails different in size from those on the sole itself ; and altogether there were four different sorts of nails on the patch and soles, and in some places the nails were missing. Suspicion fell upon the prisoner, who had formerly lived as fellow-servant with the deceased, and who had been seen by several persons in the vicinity of the house a little before ten o'clock. Upon his apprehension on the following morning, his boots, trousers, shirt, and other garments were found to be stained with blood, and the trousers had been rubbed or scraped, as if to obliterate stains. The prisoner wore right and left boots, which were carefully compared with the footprints by making impressions of the soles in the soil about six inches from the original footmarks ; which exactly corresponded as to the patch, the tip, and the number, shape, sizes, and arrangement of the nails. The boots were then placed lightly upon the original impressions, and here again the correspondence was exact. There could therefore be no doubt that the impressions of all these footsteps had been made by the prisoner's boots. He had been seen about a quarter before eleven on the morning of the murder, with something bulky under his coat, near the place where the footsteps were lost on the hard ground, and proceeding thence towards the town of Wednesbury. At eleven o'clock he called at the "Pack Horse" in that place, not far from the house, where he took something to drink and immediately left, and at a little after twelve he called at another public-house, which was also near the scene of the murder, where he stayed some time smoking and drinking. In the interval between the times when the

prisoner had called at these public-houses, he was seen at some distance from them, near an old whimsey; and he was subsequently seen returning in the opposite direction towards Wednesbury. Five days afterwards, upon further search, the same footprints were discovered on a footpath leading in a direction from the "Pack Horse" towards the whimsey, where two bricks appeared to have been placed to stand upon, close to which was found an impression of a right foot corresponding with the impressions which had been before discovered; and in the flue was concealed a handkerchief in which were tied up a pair of trousers and waistcoat, part of the property stolen from the house. The prisoner must have availed himself of the interval between the times when he was seen at the two public-houses, to secrete the stolen garments in the whimsey, and thus to divest himself of the bulky articles which had been observed under his coat on his arrival at the "Pack Horse." The jury, after deliberating several hours, returned a verdict of guilty, and he was executed pursuant to his sentence, having previously made a confession of his guilt.¹

¹ Reg. v. Beards, coram Mr. Serjeant ATCHERLEY; and see other cases of this kind, Rex v. Richardson, Rex v. Smith and others, *infra*; Rex v. Spiggott and others, 4 Cel. Tr. 446.

CHAPTER II.

IDENTIFICATION OF ARTICLES OF PROPERTY.

THE identification of articles of property, like that of the human person, is capable of being established, not only by direct evidence, but by means of numberless circumstances which it is not possible to enumerate. Most of the cases of identification which have been enumerated in the preceding chapter are in fact cases of identification of articles of property, applied inferentially to the establishment of personal identity, and sufficiently illustrate the difficulties which attend investigations of this kind.

The following cases, as well as others which have been already mentioned, show how liable even well-intentioned witnesses, who speak to facts of this particular kind, are to error and misconception.

At the Spring Assizes, at Bury St. Edmunds, 1830, a respectable farmer, occupying twelve hundred acres of land, was tried for burglary and stealing a variety of articles. Amongst the articles alleged to have been stolen were a pair of sheets and a cask, which were found in the possession of the prisoner, and were positively sworn to by the witnesses for the prosecution to be those which had been stolen. The sheets were identified by a particular stain, and the cask by the mark "P. C. 84," enclosed in a circle at one end of it. On the other hand, a number of witnesses swore to the sheets being the prisoner's, by the same mark by which they had been identified by the witnesses on the other side as being the prosecutor's. With respect to the cask, it was proved by numerous witnesses, whose respectability left no doubt of the truth of their testimony, that the prisoner was in the habit of using cranberries in his establishment, and that they came in casks, of which the cask in question was one. In addition to this, it was proved that the prisoner purchased his cranberries from a tradesman

in Norwich, whose casks were all marked "P. C. 84.," enclosed in a circle, precisely as the prisoner's were, the letters P. C. being the initials of his name, and that the cask in question was one of them. In summing up, the learned judge remarked that this was one of the most extraordinary cases ever tried, and that it certainly appeared that the witnesses for the prosecution were mistaken. The prisoner was acquitted.¹

A man was tried in Scotland for housebreaking and theft. The girl whose chest had been broken open, and whose clothes had been carried off, swore to the only article found in the prisoner's possession, and produced, namely, a white gown, as being her property. She had previously described the color, quality, and fashion of the gown, and they all seemed to correspond with the article produced. The housebreaking being clearly proved, and the goods, as it was thought, clearly traced, the case was about to be closed by the prosecutor, when it occurred to one of the jury to cause the girl to put on the gown. To the surprise of every one present, it turned out that the gown which the girl had sworn to as belonging to her, which corresponded with her description, and which she said she had worn only a short time before, would not fit her person. She then examined it more minutely, and at length said it was not her gown, though almost in every respect resembling it. The prisoner was, of course, acquitted; and it turned out that the gown produced belonged to another woman, whose house had been broken into about the same period, by the same person, but of which no evidence had at that time been produced.²

A woman was convicted of larceny on proof that a number of small articles of commerce, alleged to have been stolen, were found in her possession. The complaining witness swore positively to the identity of the articles, but the defendant produced witnesses who testified that the articles had been purchased by the defendant a short time before. The conviction was reversed.

On the trial of a young woman for child-murder, it appeared that the body of a newly-born female child was found in a pond about a hundred yards from her master's house, dressed in a shirt and cap, and a female witness deposed that the stay

¹ A. R., 1820, 50.

² *Rex v. Webster*, Burnett's C. L. of Scotland, 19 St. Tr. 494.

or tie which was pinned to the cap, and made of spotted linen, was made of the same stuff as a cap found in the prisoner's box; but a mercer declared that the two pieces were not only unlike in pattern, but different in quality.¹

A youth was convicted of stealing a pocket-book containing five one-pound notes, under very extraordinary circumstances. The prosecutrix left home to go to market in a neighboring town, and having stooped down to look at some vegetables exposed to sale, she felt a hand resting upon her shoulder, which on rising up she found to be the prisoner's. Having afterwards purchased some articles at a grocer's shop, on searching for her pocket-book in order to pay for them, she found it gone. Her suspicion fell upon the prisoner, who was apprehended, and upon his person was found a black pocket-book, which she identified by a particular mark, as that which she had lost, but it contained no money. Several witnesses deposed that the prisoner had long possessed the identical pocket-book, speaking also to particular marks by which they were enabled to identify it; but some discrepancies in their evidence having led to the suspicion that the defence was a fabricated one, the jury returned a verdict of guilty, and the prisoner was sentenced to be transported. During the continuance of the assizes, two men who were mowing a field of oats through which the path lay by which the prosecutrix had gone to market, found in the oats, close to the path, a black pocket-book containing five one-pound notes. The men took the notes and pocket-book to the prosecutrix, who immediately recognized them; and the committing magistrate dispatched a messenger with the articles found, and her affidavit of identity, to the judge at the assize town, who directed the prisoner to be placed at the bar, publicly stated the circumstances so singularly brought to light, and directed his immediate discharge. The prosecutrix must have dropped her pocket-book, or drawn it from her pocket with her handkerchief, and had clearly been mistaken as to the identity of the pocket-book produced upon the trial.²

It is not, however, necessary that the identity of stolen property should be invariably established by positive evidence. In a prosecution against a vessel for a violation of law it is not

¹ *Rex v. Bate*, Warwick Autumn Ass., 1809, before Mr. Justice LE BLANC.

² *Rex v. Gould*, coram Mr. Barron GARROW, Stafford Summ. Ass., 1820.

CHAPTER III.

PROOF OF HANDWRITING.

SECTION I.

Proof by Direct Evidence.

THE usual mode of proving handwriting is by the direct testimony of some witness who has either seen the party write, or acquired a knowledge of his handwriting, from having corresponded with him, and had transactions in business with him, on the faith that letters purporting to have been written or signed by him were genuine. In either case the witness is supposed to have received into his mind an exemplar of the general character of the handwriting of the party, impressed on it as the involuntary and unconscious result of constitution, habit, or other permanent cause, and which is therefore itself permanent; and he is called on to speak to the writing in question by reference to the standard so formed in his mind.¹

A witness cannot testify as to handwriting unless his knowledge is first shown.² Not every person who has seen a party write is competent to testify or give an opinion upon the genuineness of a signature. In the course of a busy life we may see many persons write, in many instances merely casually, the recollection of which is entirely effaced from the memory, as much so as if he had never seen the writing. In order to make a witness competent he must be able to say that he has some knowledge or acquaintance with the handwriting of the person, or believes he has such knowledge or

¹ Per COLERIDGE, J., in *Doe d. Mudd v. Suckermore*, 5 A. & E. 705, and 2 N. & P. 16. And see *Fee v. Taylor*, 83 Ky. 259.

² *Arthur v. Arthur*, 38 Kan. 691.

acquaintanceship, acquired by seeing him write many times, or once, or in some other legal way. The extent of his knowledge or familiarity with the handwriting in question enters into the weight of his testimony, but does not affect its competency.¹

Any person who has seen the party write and has acquired a standard in his mind of the general character of the party's writing is competent to testify.² A witness who has seen a party write but once may be competent to testify to his handwriting;³ and the court may, in its discretion, allow a witness to testify who has seen the party write only twice in 32 years.⁴ The prosecutor in a criminal case, while it was pending, procured the defendant to write in his presence that he might become familiar with his handwriting, and his testimony was admitted as to the handwriting.⁵ The signature of a person may be proved by a witness who has seen him write his surname only.⁶

Though the witness has never seen the party write, if he has carried on a written correspondence with him, that will be sufficient to enable him to speak to the handwriting.⁷ For

¹ See opinion of the court in *Nelins v. State* (Ala.), 9 So. 193.

² *Succession of Morvant*, 45 La. Ann. 207; *Berg v. Peterson*, 49 Minn. 420.

³ *Bowman v. Sanborn*, 5 Foster, 87; *Garrels v. Alexander*, 4 Esp. 37.

⁴ *Wilson v. Van Leer*, 127 Pa. St. 371.

⁵ *Reid v. State*, 20 Ga. 681. Held otherwise in *Springer v. Hall*, 83 Mo. 693. See also *Stranger v. Serle*, 1 Esp. 14, where Lord KENYON rejected the evidence on the ground that the defendant might have written differently from his common writing, through design. And where, after a suspicion had been raised that the prisoner had sent a threatening letter, a policeman was sent to pay the prisoner some money, and to procure a receipt from him for it, that he might see him write and be able to speak to his handwriting, and he obtained a receipt accordingly, but had no previous knowledge of the prisoner's handwriting, MAULE, J., held that knowledge so obtained for the specific purpose, and under such a bias, was not such as to make the evidence admissible. *Reg. v. Crouch*, 4 Cox C. C. 163. And where the prisoner was tried for uttering a forged check on which he was alleged to have written a certain indorsement at the time he uttered the check, and he afterwards wrote his name and the same words as were in the indorsement, at request of a person, on another piece of paper, it was held that this paper was not admissible for the purpose of comparison. *Reg. v. Aldridge*, 3 F. & F. 781. A witness may prove the identity of a mark from having seen the party make it on several occasions. *George v. Surrey*, M. & M. 516.

⁶ *Lewis v. Sapio*, Moo. & Mal. 39, per ABBOTT, C. J., overruling *Powell v. Ford*, 2 Stark. 164; 3 E. C. L. R.

⁷ *Campbell v. Woodstock Iron Co.*, 83 Ala. 351.

when letters are sent directed to a particular person and on particular business and an answer is received in due course, a fair inference arises that the answer was sent by the person whose handwriting it purports to be.¹

And so, in general, if a witness has received letters from the party in question and has acted upon them, it is a sufficient ground for stating his belief as to the handwriting.² And while the receipt of letters, though the witness has never done any act upon them, has been held sufficient,³ it is the law of the present day that a witness is incompetent who has merely seen the writings and has not communicated with the alleged writer with regard to them, nor acted upon them. The mere receipt of friendly letters is said not to be enough: there must have been some admission or acquiescence equivalent to an acknowledgement that the person claimed was the writer, independent of the receipt of the letters and the contents thereof;⁴ there must be something which assures the recipient of the letters, in a responsible way, of their genuineness.⁵

Where a witness who had never seen the defendant, but had corresponded with a person of the defendant's name, living at the place where the defendant resided, and where, according to other evidence, there was no other person of the same name, stated that the handwriting in question was that of the person with whom he had corresponded, the evidence was held sufficient.⁶ On an information for libel, in order to show that certain letters were in the handwriting of the defendant, a witness proved that though he had never seen the defendant write, he had seen a number of letters which purported to have come from him in the subject of a cause in which he was engaged on one side, and the witness on the other side; and Lord Tenterden, C. J., held that the witness was

¹ *Cary v. Pitt*, per Lord KENYON, Peake Ev. 85. And see *Page v. Hemans*, 14 Me. 478; *State v. Gay*, 94 N. C. 814; *McKonkey v. Gaylord*, 1 Jones' L. 94; *Chaffee v. Taylor*, 3 Allen, 598; *Thomas v. State*, 108 Ind. 417; *Robinson Consolidated Min. Co. v. Craig*, 4 N. Y. St. R. 478.

² *Thorpe v. Gibsburne*, 2 C. & P. 21; 12 E. C. L. R.

³ *Doe v. Wallinger*, Mann. Index, 181.

⁴ *Flowers v. Fletcher* (W. Va.), 20 S. E. 870. And see *Gibson v. Furniture Co.*, 96 Ala. 357; *Freeman v. Brewster*, 93 Ga. 648.

⁵ *Pinkham v. Cockell*, 87 Mich. 265.

⁶ *Harrington v. Fry*, 1 Ry. & Moo. 90.

competent to prove the defendant's handwriting.¹ And where a witness for the defendant stated that he had never seen the party in question write, but that his name was subscribed to an affidavit which had been used by the plaintiff, and that he had examined that signature so as to form an opinion which enabled him to say that he believed the handwriting in question was genuine, this was held by Park, J., to be sufficient,² and so when the witness had received promissory notes which the party had paid.³ And the testimony of an officer of a bank who was in the habit of paying the party's checks has been admitted.⁴ And, to prove a forgery, the testimony was received of one who had once carried to a bank a large number of bank notes which had been all paid, though he had never seen either the president or cashier write.⁵ And a successor in office who has given frequent examination to his predecessor's handwriting is a competent witness.⁶ But where an attorney for three defendants stated that he did not know the handwriting of one of the defendants, but before undertaking to defend the action he had required a retainer signed by all those defendants, and had received a retainer purporting to be signed by them all, upon which he had acted, it was held that the attorney was not competent to prove the handwriting of the one defendant, for the other two defendants might have signed the retainer for him with his assent.⁷

It is necessary to recall these leading principles of proof of handwriting by direct, as introductory to the consideration of the various methods of proof by indirect, evidence.

SECTION II.

Proof by Indirect Evidence.

Evidence of similitude of handwriting by the comparison

¹ *Rex v. Slaney*, 5 C. & P. 213; 24 E. C. L. R.

² *Smith v. Sainsbury*, 5 C. & P. 196; 24 E. C. L. R.

³ *Johnson v. Deverne*, 19 Johns. 134.

⁴ *Coffin's Case*, 4 City Hall Rec. 52. And see *Murieta v. Wolfhagen*, 2 C. & K. 744; *Snell v. Bray*, 56 Wis. 156; *Salazar v. Taylor*, 88 Pac. 369. But such testimony could not be received if some of the checks paid were forged. *Brigham v. Peters*, 1 Gray, 139.

⁵ *Com. v. Carey*, 2 Pick. 47.

⁶ *Burdell v. Taylor*, 89 Cal. 618.

⁷ *Drew v. Prior*, 5 M. & Gr. 264; 44 E. C. L. R.

of controverted writing with the admitted or proved writing of the party, made by a witness who has never seen the party write, nor has any knowledge of his handwriting, and who arrives at the inference that it is his handwriting because it is like some other which is so,¹ is a mode of proof which has been much lauded by writers on the civil law, and is commonly admitted in those countries whose jurisprudence is founded on that system.

All evidence of handwriting except where the witness saw the disputed document written is, in a sense, in its nature comparison. It is the belief which a witness entertains upon comparing the writing in question with an exemplar in his mind derived from some previous knowledge.² But that is not what is meant in law by proof of handwriting by comparison,

Formerly a document could not be proved by comparing the handwriting with other handwriting of the same party admitted to be genuine.³ A witness having no previous knowledge of the handwriting of a party could not be permitted to testify as to its authenticity from a mere comparison of hands in court.⁴ He might refresh his memory by inspecting genuine writing; but he was incompetent if such inspection enabled him to speak only from comparing the two signatures.⁵ He must swear to the correspondence of the signatures with an example existing in his own mind.⁶ Such evidence, however, was admissible in corroboration of other evidence;⁷ though it has been held, it would not invalidate the positive testimony of an impeached witness.⁸

This rule as to comparison did not apply to the court or jury

¹ Benth. Jud. Ev. b. iii. c. 7; *Rex v. De la Motte*, 21 St. Tr. 810.

² *Doe v. Suckermore*, 5 Ad. & E.; *Berg v. Peterson*, 49 Minn. 420.

³ *Burr v. Harper*, Holt N. P. 421; *U. S. v. Craig*, 4 Wash. C. C. 729; *Hutchin's Case*, 4 City Hall Rec. 119; *Com. v. Smith*, 6 S. & R. 571; *Pa. v. McKee*, Addison, 33; *Jackson v. Phillips*, 9 Cow. 94; *Root's Adm. v. Rite's Adm.*, 1 Leigh, 216; *Martin v. Taylor*, 1 Wash. C. C. 1; *Pope v. Askew*, 1 Ired. L. 16.

⁴ *Wilson v. Kirkland*, 5 Hill, 182. See *Guffrey v. Deeds*, 5 Cas. 378.

⁵ *McNair v. Com.*, 2 Cas. 388.

⁶ *Kinney v. Flynn*, 2 R. I. 319; *Hopkins v. Maguire*, 35 Me. 78.

⁷ *McCorkle v. Binna*, 5 Binn. 349; *Farmer's Bk. v. Whitehill*, 10 S. & R. 110; *Bank of Pa. v. Jacob's Adm.*, 1 P. & W. 161; *Boyd's Adm. v. Wilson*, 1 P. & W. 211; *Myers v. Foscan*, 3 N. H. 47; *Com. v. Smith*, 8 S. & R. 571; *Moody v. Rowell*, 17 Pick. 490; *Richardson v. Newcomb*, 21 Pick. 315.

⁸ *Bell v. Norwood*, 7 La. 95.

who might compare the two documents, already properly in evidence in the cause, and from such comparison form a judgment upon the genuineness of the handwriting.¹ In such a case the comparison may be made with or without the aid of experts.² Other instruments or signatures were inadmissible for comparison only.³ And the rule which excludes extrinsic papers and signatures is substantially the same in the direct and cross-examination. Touching the admissibility of the writings, it would make no difference whether they were used to test the witness as an expert, or to test his knowledge of the handwriting of the plaintiff.⁴

Nor did the rule apply in the case of ancient documents. Authentic ancient writings might be put into the hands of a witness, and he might be asked whether upon a comparison of those with the document in question he believed the latter to be genuine.⁵ Here the course is to produce other documents either admitted to be genuine or proved to have been respected and acted upon as such by all parties, and to call experts to compare them, and to testify their opinion concerning the genuineness of the instruments in question.⁶

In these excepted cases,⁷ the evidence is admitted, it is said, of necessity, in the former case because it is not possible to prevent the jury from making such comparison, and therefore it is best, as was remarked by Lord Denman,⁸ for the court

¹ *Griffiths v. Williams*, 1 Cr. & J. 47; *Solita v. Yarrow*, 1 Moo. & R. 133; *Strother v. Lucas*, 6 Pet. 763; *Thomas v. Herlackner*, 1 Dall. 14; *Woodward et al. v. Spiller*, 1 Dana, 180; *Adams v. Field*, 21 Verm. 256; *Henderson v. Hackney*, 16 Ga. 521.

² 1 Greenl. on Ev. § 578; *State v. Scott*, 45 Mo. 302; *Huff v. Nims*, 11 Neb. 363; *Grand Id. Bk. Co. v. Shoemaker*, 31 Neb. 124.

³ *Van Wyck v. McIntosh*, 4 Kern. 439; *Bishop v. State*, 30 Ala. 34; *Miles v. Loomis*, 75 N. Y. 288.

⁴ *Rose v. First Natl. Bank*, 91 Mo. 399.

⁵ *Doe v. Tarver*, Ry. & Moo. N. P. C. 141; 7 East, 282; *West v. State*, 2 Zab. 212.

⁶ 1 Greenl. on Ev. (14th Ed.) 674. See *State v. Clinton*, 67 Mo. 380; *Springer v. Hall*, 83 Mo. 693; *State v. Scott*, *supra*.

⁷ *Allport v. Meek*, 4 C. & P. 267; *Bromage v. Rice*, 7 Id. 548; *Waddington v. Cousins*, Id. 595; *Griffith v. Williams*, 1 C. & J. 47; *Doe d. Perry v. Newton*, 1 N. & P. 1; and 5 A. & E. 514; *Solita v. Yarrow*, 1 M. & R. 133; *Griffiths v. Ivery*, 11 A. & E. 222.

⁸ In *Doe d. Perry v. Newton*, *ut supra*. *Fitzwalter Peerage*, 10 C. & F. 193; *Doe d. Jenkins v. Davies*, 10 Q. B. 314; 16 L. J. Q. B. 228. And see *Reg. v. Taylor*, 6 Cox's C. C. 58; *State v. Scott*, 45 Mo. 302.

to enter with the jury into that inquiry, and do the best it can under circumstances which cannot be helped; in the latter, because from the lapse of time no living person can have any knowledge of the handwriting from his own observation,¹ and because in ancient documents it often becomes a pure question of skill, the character of the handwriting varying with the age, and the discrimination of it being materially assisted by antiquarian researches.²

The objections which have been urged to receiving other instruments, for the purpose of comparison, have been the multiplying of collateral issues; the danger of fraud or unfairness in selecting instruments for that purpose, from the fact that handwriting is not always the same, and is affected by age and by the various circumstances which may attend the writing; and the surprise to which a party against whom such evidence is produced may be subjected.³

The common-law rule, with its exceptions, is followed, generally, in the Federal courts,⁴ and also in the courts of some of the States. In Missouri writings admitted to be genuine, which are already in the case, can be used for comparison only when no collateral issue can be raised concerning them.⁵ In Alabama a comparison may be instituted between writings admitted to be genuine;⁶ but extraneous papers are inadmissible for comparison.⁷ The rule forbidding proof by comparison has been recently affirmed in Maryland;⁸ and in Louisiana the courts have refused to admit this kind of proof.⁹ In Illinois

¹ Per PATTERSON, J., in *Doe d. Mudd v. Suckermore*, *ut supra*. And see *Clark v. Wyatt*, 15 Ind. 271.

² Per COLERIDGE, J., *Id.*

³ See opinion of WAGNER, J., in *State v. Scott*, 45 Mo. 802, and of DICKINSON, J., in *Morrison v. Porter*, 35 Minn. 425. See also *Tucker v. Kellogg*, 8 Utah 11.

⁴ *Moore v. U. S.*, 91 U. S. 270; *Blewett v. U. S.*, 10 Ct. of Cl. 235; *U. S. v. McMillan*, 29 Fed. Rep. 247; *U. S. v. Pendergast*, 32 Fed. Rep. 198; *Stokes v. U. S.*, 157 U. S. 187.

⁵ *Rose v. First Nat'l Bank*, 91 Mo. 399.

⁶ *Nelins v. State (Ala.)*, 9 So. 193.

⁷ *Bishop v. State*, 30 Ala. 34; *Kirksey v. Kirksey*, 41 Ala. 626; *Bestor v. Roberts*, 58 Ala. 331; *Moon's Adm. v. Crowder*, 72 Ala. 79; *Gibson v. Trowbridge Furniture Co.*, 96 Ala. 357.

⁸ *Tome v. Parkersburg R. R. Co.*, 39 Md. 92; *Herrick v. Swomley*, 56 Md. 439.

⁹ *State v. Fritz*, 22 La. Ann. 55. But on a trial for bigamy the defendant's letters were proved by comparison. *State v. Barrow*, 31 La. Ann. 691.

disputed handwriting "cannot be proved by a witness examining and comparing the signature in controversy with the recognized signature of the person whose signature is in issue."¹

In North Carolina an expert may compare the disputed signatures with papers admitted to be genuine, which are already in evidence; but the jury may not make the comparison.²

In Kentucky a comparison can be made neither by the jury nor by experts.³

In New York the statute permits a comparison of a disputed handwriting with a genuine paper to be made by witnesses. But, it is held, this does not authorize an expert to testify positively as to the writing. He should be confined to an expression of his opinion growing out of the comparison.⁴

But by the Texas Code of Criminal Procedure⁵ it is provided that comparison of handwriting may be made by experts or the jury. And other States have similar provisions.⁶

A witness not an expert may not testify as to his opinion from comparison, as to the genuineness of a signature. This rule is not changed by the fact that he saw the genuine one executed, unless he testifies that by that means he could recognize the handwriting.⁷

In many of the States of this Union experts may testify as to the genuineness of a signature by comparison with other

¹ *Riggs v. Powell* 142 Ill. 453. See also *Kerwin v. Hill*, 87 Ill. 209; *Massey v. Bank*, 104 Ill. 330; *Bevan v. Atlanta Natl. Bank*, 142 Ill. 302. But here, as was said in a late case, and as has been heretofore laid down, "wherever that rule prevails, there is also the exception that if the instrument to be used as a standard is properly in evidence in the case for other purposes, then the signature or paper in question may be compared with it by the jury." *Rogers v. Tyley*, 144 Ill. 652; *Himrod v. Gilman*, 147 Ill. 293. And see *Stokes v. U. S.*, *supra*.

² *Yates v. Yates*, 76 N. C. 142; *Pope v. Askew*, 1 Ired. 16; *Outlaw v. Hurdle*, 1 Jones, 150. And see *Jarvis v. Vanderford* (N. C.), 21 S. E. 302.

³ *Fee v. Taylor*, 38 Ky. 259; *Hawkins v. Grimes*, 18 B. Mon. 257.

⁴ *People v. Severance*, 67 Hun, 182.

⁵ Art. 754. And see *Heacock v. State*, 13 Tex. Crim. App. 97. But the jury may not take into their room for comparison papers and letters submitted to experts. *Chester v. State*, 23 Tex. Crim. App. 577.

⁶ *Nebraska Code*, § 844; and *Oregon Code of Civil Procedure*, § 755; *Richardson v. Green* (C. C. App. 9th Ct.), 61 Fed. Rep. 423.

⁷ *Wimbish v. State*, 89 Ga. 294. And see *Mixer v. Bennett*, 70 Ia. 329; *Baker v. Mygatt*, 14 Ia. 131; *McKay v. Lasher*, 42 Hun, 270.

writings whether relevant to the issue or not. Such is the rule in Maine, New Hampshire, Massachusetts, Mississippi, Vermont, Virginia, Ohio, California, and Connecticut.¹

In Utah irrelevant papers may be introduced for purposes of comparison when admitted by the parties to be genuine.²

In Kansas writings admitted to be genuine may be compared by the jury with the disputed document.³

In Indiana the cases are in great conflict. In a recent case a witness was admitted to testify as an expert upon a comparison of the handwriting of the signature to the note in suit with specimens of the party's handwriting admitted to be genuine, as to the genuineness of the signature to the note.⁴ The signatures sought to be used in comparison, if not to papers in the cause, nor in evidence, *must be admitted to be genuine by the party against whom the paper is sought to be used.*⁵

In binding all, papers not otherwise in the case cannot be received for purposes of comparison.⁶ But where the party himself being on the stand in his own behalf denied his own signature when it was shown to him, and in cross-examination admitted signatures claimed to be identical in character; these last were allowed to go to the jury for comparison.⁷

¹ *People v. Mitchell*, 92 Cal. 590; *Calkins v. State*, 14 Ohio St. 222; *State v. Ward*, 39 Vt. 225; *State v. Hopkins*, 50 Vt. 316; *Harriot v. Sherwood*, 82 Va. 1; *Wilson v. Beauchamp*, 50 Miss. 24; *State v. Hastings*, 53 N. H. 452; *State v. Clark*, 54 N. H. 456; *State v. Thompson*, 80 Me. 194; *Woodman v. Dana*, 52 Me. 13; *Richardson v. Newcomb*, 21 Pick. 315; *Demeritt v. Randall*, 116 Mass. 331; *Lyon v. Lyman*, 9 Conn. 55.

² *Tucker v. Kellogg*, 8 Utah, 11. Prof. Greenleaf wrote: "If it were possible to extract from the conflicting judgments a rule which would find support from the majority of them, perhaps it would be found not to extend beyond this: that such papers can be offered in evidence to the jury, only when no collateral issue can be raised concerning them; which is only where the papers are either conceded to be genuine or are such as the party is estopped to deny; or are papers belonging to the witness who was himself previously acquainted with the party's handwriting, and who exhibits them in confirmation and explanation of his own testimony." 1 Greenl. Ev. § 581.

³ *State v. Zimmerman*, 47 Kan. 242; *Macomber v. Scott*, 10 Kan. 335.

⁴ *Forgey v. First Natl. Bank*, 66 Ind. 123. And see *Hazard v. Vickery*, 78 Ind. 64. See also *Morrison v. Porter*, 35 Minn. 525.

⁵ *Shorb v. Kinzie*, 80 Ind. 580. And see *Brodict v. Hunt*, 43 Ind. 381; *Huston v. Schindler*, 46 Ind. 38; *Thomas v. State*, 103 Ind. 419; *Merritt v. Shaw*, 33 N. E. 657.

⁶ *Vinton v. Peck*, 14 Mich. 287; *Re Foster's Will*, 34 Mich. 21; *North v. McConnell*, 43 Mich. 478.

⁷ *Deitz v. Fourth Natl. Bank*, 69 Mich. 287.

But when handwriting is to be proved by comparison, the standard used for the purpose must be genuine and original writing, and must be an admitted manuscript, or be established by clear and undoubted proof.¹ Impressions of writings taken by means of a press, and duplicates made by a copying machine, are not original, and cannot be used as standards of comparison.²

The question of the admissibility of the document to be used as a standard is a preliminary question for the determination of the court.³

So far as the judge's decision is a question of fact merely, it is final, if there is any proper evidence to support it. Exceptions to its admission as a standard will not be sustained unless it clearly appears that there was some erroneous application of the principles of law to the facts of the case, or that the evidence was admitted without proper proof of the qualifications requisite for its competency.⁴ The rule is otherwise, however, in New Hampshire. In a case already cited,⁵ Sargent, C. J., speaking of the introduction of evidence to prove the genuineness of the handwriting offered as a standard, said: "It is to be received and then the jury are to be instructed that they are first to find, upon all the evidence bearing upon that point, the fact whether the writing introduced for the purpose of comparison or sought to be used for that purpose is genuine. If they find it is not so, then they are to lay this writing, and all the evidence based upon it, entirely out of the case, but if they find it genuine they are to receive the writing and all the evidence founded upon it."

The rule that no document could be used for comparison unless it was already in evidence in the cause⁶ was changed in

¹ *State v. Owen*, 73 Mo. 440; *State v. Thompson*, 80 Me. 194; *Hatch v. State*, 6 Tex. Crim. App. 384; *Heacock v. State*, 13 Tex. Crim. App. 97; *Costello v. Crowell*, 133 Mass. 352; *Baker v. Haines*, 6 Whart. 284; *Cohen v. Teller*, 93 Pa. St. 123.

² *Com. v. Eastman*, 1 Cush. 189. And see *Van Sickle v. People*, 9 Mich. 61; *Spottiswood v. Weis*, 66 Cal. 525; *Cohen v. Teller*, 93 Pa. St. 123.

³ *Egan v. Cowan*, 2 Irish Jurist, N. S. 394; *Hall v. Van Vrankin*, 64 How. Pr. 407; *Peck v. Callaghan*, 95 N. Y. 73; *Costello v. Crowell*, 133 Mass. 352; *Rowell v. Fuller*, 59 Vt. 688.

⁴ *Rowell v. Fuller*, and *Costello v. Crowell*, *supra*.

⁵ *State v. Hastings*, 53 N. H. 461.

⁶ *Rex v. Morgan*, 1 Moo. & Robb. 184 n.; *Hughes v. Rodgers*, 8 M. & W. 123; *Younge v. Horner*, 1 C. & K. 751; *Doe v. Newton*, *Bromage v. Rice*, *supra*.

England by the Common Law Procedure Act,¹ which provided that comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall in civil cases be permitted to be made by witnesses, and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute. And this provision was extended to criminal cases by a later statute.² And some of the states of this country have enacted laws modelled after the English statute. This is the case in New York,³ Wisconsin,⁴ Rhode Island,⁵ Georgia,⁶ and New Jersey.⁷ In the last named State it is "provided nevertheless that where the handwriting of any person is sought to be disproved by comparison with other writings, not admissible in evidence in the cause for any other purpose, such writings, before they can be compared with the signature or writing in dispute, must, if sought to be used before the court or jury by the party in whose handwriting they are, be proved to have been written before any dispute arose as to the genuineness of the signature or writing in controversy."⁸

And in New York it has been held that the act authorizes only the admission of such writings as purport to be in the handwriting of the person the genuineness of whose signature is disputed. Therefore specimens of the handwriting of the person who is alleged to have forged the signature in question are not admissible.⁹

In South Carolina on an indictment for forgery the rule in that State was stated to be that while comparison of handwriting is inadmissible as an original means of ascertaining the genuineness of a signature, it may be admitted in aid of doubtful proof. The trial judge must decide, in the first instance,

¹ 17 and 18 Vict. c. 125, § 27. See *Birch v. Ridgway*, 1 F. & F. 270; *Creswell v. Jackson*, 2 F. & F. 24.

² 28 Vict. c. 18, § 8.

³ Laws of 1890, c. 36.

⁴ Laws of 1871, c. 226.

⁵ Pub. St. of R. I. (1882), c. 214, § 42.

⁶ Georgia Code, § 8840. Other new papers which it is proposed to introduce in evidence must be submitted to the opposite party before he announces himself ready for trial. A failure to comply with this provision will not cause a reversal where the party having the right did not object at the proper time. *Thomas v. State*, 59 Ga. 784.

⁷ Rev. St. of New Jersey, p. 881, § 19.

⁸ *Yeomans v. Petty*, 40 N. J. Eq. 495; *In re Gordon's Will*, 26 Atl. 268.

⁹ *Peck v. Callaghan*, 95 N. Y. 78.

whether sufficient doubt has been raised to authorize the comparison. And the witnesses speaking to the comparison need not be experts.¹ But those unfamiliar with handwriting, not being competent to compare, may not be introduced for this purpose.² Papers by which the comparison is to be made must be either admitted, acknowledged, or otherwise proved to be in the handwriting of the accused.³

In Pennsylvania "evidence by comparison of handwriting is not allowed as independent proof;" but extraneous papers may be admitted and submitted to the jury for comparison in confirmation of prior evidence. The comparison may not be made by experts.⁴

In Ohio, however, not only persons who have knowledge of the handwriting of the person whose writing is in question may testify, but experts.⁵

Evidence to handwriting is subject to many sources of fallacy and error, among which may be enumerated tuition by the same preceptor, employment with other persons in the same place of business, as well as designed imitation or disguise, all of which are frequently causes of great similarity in writing. Men in certain businesses or professions sometimes adopt peculiarities of character, though less frequently than formerly; and there are characteristic peculiarities indicative of age, infirmity, and sex.⁶

Handwriting is sometimes most successfully imitated. On a trial for forgery of bank-notes, a banker's clerk whose name was on one of the notes swore distinctly that it was his handwriting, while he spoke hesitatingly with respect to his genuine subscription.⁷ Lord Eldon mentioned a very remarkable instance of the uncertainty of this kind of evidence. A deed was produced at a trial on which much doubt was thrown as a discreditable transaction. The solicitor was a very respectable man, and was confident in the character of his attesting witnesses. One of them purported to be Lord Eldon himself, and the solicitor, who had referred to his signature to pleadings,

¹ *State v. Ezekiel*, 33 S. C. 115. And see *Benedict v. Flanigan*, 18 S. C. 508; *Graham v. Nesmith*, 24 S. C. 296.

² *Weaver v. Whilden*, 33 S. C. 190.

³ *State v. Ezekiel*, *supra*.

⁴ *Amrick v. Mitchell*, 1 Norris, 211; *Ballentine v. White*, 27 P. F. Smith, 20; *Berryhill v. Kirchner*, 96 Pa. St. 489; *Travis v. Brown*, 43 Pa. St. 17; *In re Rocky's Estate*, 155 Pa. St. 455.

⁵ *Bell v. Brewster*, 44 Ohio St. 696.

⁶ *Rex v. Johnson*, *ut supra*.

⁷ *Rex v. Carsewell*, Burnett's C. L. of Scot. 502.

had no doubt of its authenticity, yet Lord Eldon declared that he had never attested a deed in his life.¹

In a case in Doctors' Commons the learned judge repudiated the common objection of painting or touching, as a reason for inferring fraud, saying that there could scarcely be a less certain criterion, and peremptorily declined the use of a glass of high powers, said to have been used by the professional witnesses, observing, in substance, that glasses of high powers, however fitly applied to the inspection of *natural* subjects, rather tend to distort and misrepresent than to place *such* objects in their *true* light; especially when used (their ordinary application in the hands of prejudiced persons) to confirm some theory or preconceived opinion.² But it is the daily practice of courts of common law to admit the artificial aid of glasses and lamps; and on an indictment for forgery, the question being whether a paper had originally contained certain pencil-marks which were alleged to have been rubbed out, and ink-writing written in their stead, the opinion of an engraver, who was in the habit of looking at minute lines on paper, and had examined the document with a mirror, was held to be receivable, although of no weight unless confirmed.³ On suit on a promissory note where the signature was denied, one skilled in the use of a compound microscope was allowed to testify that upon examination of the paper upon which the note was written, under the microscope he discovered traces of pencil-marks and that the fibre of the paper had the appearance of having been broken before the ink was laid on.⁴

Enlarged copies of a disputed signature or writing and of those used as comparisons may be of great aid to a jury in comparisons and examining different specimens of one's handwriting. And for this reason, and also for greater convenience, it is the common practice to admit photographs of the different signatures.⁵

¹ *Eagleton v. Kingston*, 8 Ves. 473.

² *Robson v. Rocke*, 2 Addams, 79.

³ *Reg. v. Williams*, 8 C. & P. 434.

⁴ *Bridgman v. Corey*, 62 Vt. 1.

⁵ *Marcy v. Gray*, 16 Gray (Mass.), 161; *Rowell v. Fuller*, 59 Vt. 598; *In re Gordon's Will*, 268, and the famous Tichborne Case.

SECTION III.

The Reliability of Evidence on this Subject.

The following extract from a learned judgment of Sir John Nicholl embodies many instructive observations upon this kind of evidence: "This court has often had occasion to observe, that evidence to handwriting is at best, in its own nature, very inconclusive; affirmative, from the exactness with which handwriting may be imitated; and negative, from the dissimilarity which is often discoverable in the handwriting of the same person under different circumstances. Without knowing very precisely the state and condition of the writer at the time, and exercising a very discriminating judgment upon these, persons deposing, especially, to a mere *signature* not being that of such or such a person, from its dissimilarity, however ascertained or supposed to be, to his usual handwriting, are so likely to err, that negative evidence to a mere subscription, or signature, can seldom, if ever, under ordinary circumstances, avail in proof, against the final authenticity of the instrument to which that subscription, or signature, is attached. But such evidence is peculiarly fallacious where the dissimilarity relied upon is not that of general character, but merely particular letters; for the slightest peculiarities of circumstance or position, as, for instance, the writer sitting up or reclining, or the paper being placed upon a harder or softer substance, or on a plane more or less inclined, nay, the materials, as pen, ink, etc., being different at different times, are amply sufficient to account for the same *letters* being made variously at the different times by the same individual. Independent, however, of anything of this sort, few individuals, it is apprehended, write so uniformly that dissimilar formations of particular letters are grounds for concluding them not to have been made by the same person."¹

Very similar were the remarks recently made concerning this subject in the course of a learned judgment of the Prerogative Court of New Jersey. And the Ordinary proceeded further to say: "It follows that unreliability is greater when the disputed writing is short, or the standards for comparison are meagre, or are all written at one time, and also that uncertainty lessens

¹ Robson v. Röcke, 2 Addams, 79.

when the disputed writing is long, and the standards are numerous and the products of different dates.”¹

The difficulty of proving handwriting is greatly increased where it is studiously disguised. In *Webster's* case anonymous letters written in a disguised hand and calculated to divert suspicion from the defendant had been sent to a newspaper for publication.² But such is the power of habit, that though persons may succeed to a certain extent in disguising their writing, they commonly fall into their natural manner and characteristic peculiarities of writing;³ such peculiarities being most commonly manifested in the formation of particular letters, or in the mode of spelling particular words.⁴ Judge Taylor instances a case where the defendant produced a receipt worded as follows: “Received the Hole of the above.” Upon being required to write a sentence containing the word *whole*, the party spelled it as written above, even retaining the capital H.⁵

A tailor, of the name of Alexander, having learned that a person of the same name had died, leaving considerable property without any apparent heirs existing, obtained access to a garret in the family mansion, and, it was said, found there a collection of old letters about the family. These he carried off, and with their aid fabricated a mass of similar productions, which, it was said, clearly proved his connection with the family of the deceased, and the Lord Ordinary decided the cause in his favor; the case, however, was carried to the Inner House. When it came into court, certain circumstances led Lord Meadowbank, then a young man at the bar, to doubt the authenticity of the documents. One circumstance was, that there were a number of words in the letters, purporting to be from different individuals, spelt, or rather misspelt, in the same way, and some of them so peculiar, that on examining them minutely, there was no doubt that they were all written by the same hand. The case attracted the attention of the Inner House. The party was brought to the clerk's table, and was examined in the presence of the court. He was desired to write to dictation of

¹ McGill, Ordinary, in *Re Gordon's Will*, 26 Atl. 268.

² *Com. v. Webster*, 5 Cush. 295.

³ Per MACDONALD, C. J., in *Rex v. Bingham*, Horsham Spr. Ass., 1811.

⁴ *Rex v. Johnson*, *supra*.

⁵ Taylor on Ev. § 1669 n., p. 1586, Text-Book Series.

the Lord Justice Clerk, and he misspelt all the words that were misspelt in the letters in precisely the same way; and this and other circumstances proved that he had fabricated all of them himself. He then confessed the truth of his having written the letters on old paper, which he had found in the garret; and this result was arrived at in the teeth of the testimony of half a dozen engravers, all saying that they thought the letters were written by different hands.¹

It is even more difficult to depose with confidence to the identity of a disguised writing, if the disguise is applied to printed characters, and Mr. Baron Rolfe spoke of such evidence as of no value.²

Regarding the weight to be attached to the evidence of skilled witnesses as to the identity of disputed writings, an opinion to which reference has already been made contains the following observations: "Handwriting is an art concerning which correctness of opinion is susceptible of demonstration, and I am fully convinced that the value of the opinion of every handwriting expert as evidence must depend upon the clearness with which the expert demonstrates its correctness. That demonstration will naturally consist in the indication of similar characteristics, or lack of similar characteristics, between the disputed writing and the standards, and the value of the expert's conclusion, will largely depend upon the number of those characteristics which appear or are wanting. The appearance or lack of one characteristic may be accounted to coincidence or accident, but, as the number increases, the probability of coincidence or accident will disappear, until conviction will become irresistible. Without such demonstration the opinion of an expert in handwriting is a low order of testimony, for, as the correctness of his opinion is susceptible of ocular demonstration, and it is a matter of common observation that an expert's conclusion is apt to be influenced by his employer's interest, the absence of demonstration must be attributed either to deficiency in the expert or lack of merit in his conclusion. It follows that the expert who can most clearly point out will be most highly regarded and most successful."³

¹ Related by Lord MEADOWBANK in *Reg. v. Humphreys*, *infra*. And see the case of *Smith v. Earl Ferrers*, *Shorthand Rep.* 1846.

² *Webster's Case*, 5 Cush. 295; *Reg. v. Rush*, *Norwich Spr. Ass.*, 1849.

³ *In re Gordon's Will*, 26 Atl. 268.

Every reasonable opportunity should be afforded to test the value of the opinion of the witness. For this purpose experts may be asked on cross-examination to make comparisons between two signatures of a witness in the case—one admitted by him to be genuine, and the other claimed by him to have been written by some one else, but by his authority and direction.¹ And they may be asked concerning their opinion as to the genuineness of signatures in the handwriting of any one, prepared for the purpose.²

¹ Johnston Harvester Co. *v.* Milburn, 72 Mich. 265.

² Browning *v.* Gosnell (Iowa), 59 N. W. 340.

CHAPTER IV.

VERIFICATION OF DATES AND TIME.

AMONGST the numerous physical and mechanical circumstances which have occasionally led to the detection of forgery and fraud, a discrepancy between the date of writing and the *Anno Domini* water-mark in the fabric of the paper is one of the most striking;¹ but inasmuch as prospective issues of paper, bearing the water-mark of a succeeding year, are occasionally made, this circumstance is not always a safe ground of presumption;² and it is not uncommon among manufacturers both to post-date and to ante-date their paper-moulds. A witness examined in 1834 stated that he was then making moulds with the date of 1828, under a special order.³ In an old case a criminal design was detected by the circumstance that a letter, purporting to come from Venice, was written upon paper made in England.⁴

The critical examination of the internal contents of written instruments, perhaps of all others, affords the most satisfactory means of disproving their genuineness and authenticity, especially if they profess to be the productions of an anterior age. It is scarcely possible that a forger, however artful in the execution of his design, should be able to frame a spurious composition without betraying its fraudulent origin by peculiarities of writing or orthography characteristics of a different age or period, or by the employment of words of later introduction, or by the use of them in a sense or meaning which they did not then bear, or by some statement or allusion not

¹ *Crisp v. Walpole*, 2 Hagg. 521.

² A Commissioner of the Insolvent Debtors' Court, sitting at Wakefield in 1836, discovered that the paper he was then using, which had been issued by the government stationer, bore the water-mark of 1837.

³ *Rodger v. Kay*, 12 Cases in Court of Session, 817; *Miller v. Fraser*, 4 Id. 55; 4 Murray's Cases in Jury Court, 118.

⁴ Best on Presumptions, 56; referring to *Moore*, 817.

in harmony with the known character, opinions, and feelings of the pretended writer, or with events or circumstances which must have been known to him, or by a reference to facts or modes of thought characteristic of a later or a different age from that to which the writing relates. A writer, eminent alike for his critical sagacity and for his imaginative genius, declared that he had met in his researches with only one poem which, if it had been produced as ancient, could not have been detected on internal evidence.¹ Judicial history presents innumerable examples in illustration of the soundness of these principles of judgment, of which the following are not the least interesting.

A deed was offered in evidence, bearing date the 13th of November in the second and third years of the reign of Philip and Mary, in which they were called "*king and queen of Spain and both Sicilies, and dukes of Burgundy, Milan, and Brabant,*" whereas at that time they were formally styled "*princes of Spain and Sicily,*" and Burgundy was never put before Milan, and they did not assume the title of king and queen of Spain and the two Sicilies until Trinity Term following.²

A most curious and instructive case of this kind was that of Alexander Humphreys, before the High Court of Justiciary at Edinburgh, April, 1839, for forging and uttering several documents in support of a claim advanced by him to the earldom of Stirling and extensive estates. One of those documents purported to be an excerpt from a charter of Novodamus of King Charles I., bearing date the 7th of December, 1639, in favor of William the first Earl of Stirling, and making the honors and estates of that nobleman, which under previous grants were inheritable only by heirs *male*, descendable in default of heirs male to his eldest heirs female, without division, of the last of such heirs male, and to the heirs male of the body of such heirs female respectively. This excerpt purported in the *testatum* clause to be witnessed by Archbishop Spottiswood "our chancellor," whereas he died on the 26th of November, 1639, and it was proved by the register of the Privy Council that he resigned the office of chancellor, and that the Great Seal was delivered to the custody of James, Marquess of

¹ 2 Lockhart's Life of Scott, c. ix.

² Mossom v. Ivy, 10 St. Tr. 616; and *vide* Coke's First Inst. 7 b.

Hamilton, on the 13th of November, 1638, more than a year before the date of the pretended charter, and that there was an interregnum in the office of chancellor until the appointment of Lord Loudon on the 30th of September, 1641. A genuine charter, dated four days after the pretended charter, was witnessed by James, Marquess of Hamilton. The circumstance was significant, that in the catalogue of the Scottish chancellors, appended to Spottiswood's History and other works, no mention is made of the interval between the resignation of the Archbishop of St. Andrews and the appointment of the Earl of Loudon. In the margin of the excerpt was a reference to the Register of the Great Seal, book 57, in the following form: "Reg. Mag. Sig. lib. 57;" but it was proved that this mode of marking and reference did not commence until 1806, when the registers were rebound, in order that they should have one title; and that previously to that time the title of those documents was, "Charters, book i., book ii.," and so on. In the supposed excerpt the son of the first earl was styled "*nostro consanguineo*," a mode of address never adopted in old charters in regard to a commoner; and there were other internal incongruities. This document consisted of several leaves stitched together, of a brown color, as well under the stitching as where open; whereas if the stitching had been old, the part of the paper not exposed to the atmosphere would have been whiter than the rest. Around the margin of this excerpt were drawn red lines; but it was proved by official persons familiar with the extracts of the period, that such lines were not introduced into the Chancery Office till about 1780. A series of anachronisms conclusively disproved the authenticity of several other documents adduced by the prisoner in support of his claim. One of those documents was a copper-plate map of Canada by Guillaume de l'Isle, "Premier Géographe du Roi, avec privilège pour vingt ans," bearing the date of 1703, on the back of which, amongst other supposed attestations, were a note purporting to be in the handwriting of Flechier, Bishop of Nismes, dated the 3d of June, 1707, and another note purporting to be in the handwriting of Fénelon, Archbishop of Cambrai, of the date of the 16th of October, 1707. It was proved that Flechier died in 1711, and the letters-patent for the installation of his successor in the bishopric of Nismes were produced, bearing date the 26th of February in that

year; that Fénelon died on the 7th of January, 1715; and that De l'Isle was not appointed geographer to the king until the 24th of August, 1718. In all of De l'Isle's editions of his map the original date of 1703 was preserved as the commencement of his copyright, but on any change of residence or of designation, he made a corresponding change in the original copper-plate from which all successive issues of the map were engraved, and it was proved by a scientific witness that the title of De l'Isle had been actually altered on the copper-plate of the map since 1718. Of course a map issued prior to 1718 could not refer to his appointment of geographer to the king, and any attestation of the date of 1707 to a map containing a recognition of that appointment must of necessity be spurious. The forger of the map must have been misled by the date of 1703 upon it, and ignorant of the fact that De l'Isle was not appointed geographer to the king until 1718; so difficult is it to preserve consistency in an attempt to impose by means of forgery. The very ink with which some of the pretended attestations were made was not the usual ink of the period, but a modern composition made to imitate ink turned old. There were other strong grounds for impugning the genuineness of these various documents, which the jury unanimously found to be forged.¹

It was observed by Lord C. B. Macdonald, that there is nothing we are so little in the habit of, as measuring with any degree of correctness small portions of time; and that if any one were to examine, with a watch which marks the seconds, how much longer a space of time a few seconds or a few minutes really are than people in general conceive them to be, they would be surprised; but that in general, when we speak of a minute, or an instant, we can hardly be understood to mean more than that it was a very short space of time.² Nevertheless it is sometimes of the highest importance accurately to fix the exact time of the occurrence of an event, and a difference of a few minutes even may be of vital moment. This frequently happens where the defence is that of an *alibi*. On a charge of murder, where the defence was of that nature,

¹ See the Reports of the Trial by Archibald Swinton, Esq., and William Turnbull, Esq.; Remarks on the Trial, by an English Lawyer; 1 Townsend's St. Tr. 408; and Dickson's L. of Ev., *ut supra*, 178.

² *Rex v. Patch*, Gurney's Report, 171.

and it was essential to fix the precise times at which the prisoner had been seen by the several witnesses soon after the fatal event which was the subject of investigation, the object was satisfactorily effected by a comparison made by an intelligent witness on the same day, of the various time-pieces referred to by the several witnesses, with a public clock ; thus affording the means of reducing the times as spoken to by them to a common standard.¹

In an indictment for rape witness testified that she met the defendant at a certain point on a certain road between the hours of eight and ten in the morning as she supposed. Another witness testified that he was at work near the place mentioned from seven in the morning till noon, and that he saw neither of the parties. Either the latter witness was mistaken as to his being so near the road that he must necessarily have observed any one passing, or the former was mistaken in her conjecture as to the time, which was quite possible, since she had no watch.²

Post-office marks are often of great importance in fixing disputed dates ; but it is remarkable that in two cases in England involving charges of murder, the defective manner in which they were impressed rendered them useless, and became the subject of judicial animadversion,³ which led to improvements calculated to render the recurrence of any such matter of complaint most unlikely.

Scientific testimony grounded on the state of wounds and injuries to the human body, or on its condition of decay, is frequently employed indirectly in the solution of questions of time ; but cases of this nature belong to the department of medical jurisprudence.

¹ *Rex v. Thornton, infra.*

² *Johnson v. State, 14 Ga. 55.*

³ By L. C. J. CAMPBELL in *Reg. v. Palmer, infra* ; and by the L. Justice Clerk in *Reg. v. Madeleine Smith, infra.*

proof from the other party. But in a criminal case the State is required to prove beyond all reasonable doubt the facts which constitute the offence. The establishment therefore of a *prima facie* case merely does not take away the presumption of innocence from the defendant, but leaves that presumption to operate, in connection with, or in aid of, any proof offered by him to rebut or impair the *prima facie* case thus made out by the State.¹

It must be admitted that in the aggregate, the number of convictions vastly exceeds that of acquittals, and that the probability is that, in a given number of cases, far the greater number of the parties accused are guilty ; but according to all judicial statistics, and under every system, a considerable proportion of the persons put upon trial are legally innocent. In any particular case, therefore, the party *may* not be guilty, and it is impossible, without a violation of every principle of justice, to act upon the contrary presumption of a superior probability of guilt. It is, therefore, a settled and inviolable principle, that anterior to contrary proof, the accused shall be considered as legally innocent, and that his case shall receive the same dispassionate and impartial consideration as if he were really so. The presumption of innocence, though not strictly evidence in favor of the accused, yet has, to the extent it goes, the effect of evidence—sufficiently so in a doubtful case to turn the scale in his favor, and produce his acquittal.²

If a house is consumed by fire, the presumption is, not that it was intentionally set on fire, but that the fire was the result of accident or of some providential cause.³

There is a general presumption against immoral conduct of every description. Thus, legitimacy is always presumed ;⁴ and cohabitation is generally presumptive proof of marriage.⁵ There is always a presumption in favor of the truth of testimony ;⁶ and it will not be presumed that a trespass or other wrong has been committed.⁷

Where a woman married again within the space of twelve

¹ Ogletree v. State, 28 Ala. 698.

² Hampton v. State, 1 Tex. Crim. App. 652.

³ Phillips v. State, 29 Ga. 105.

⁴ Banbury Peerage Case, 1 Sim. & S. 153.

⁵ Doe d. Fleming v. Fleming, 4 Bing. 266, 18 E. C. L. The rule is otherwise, however, in cases of bigamy. 1 Roscoe Cr. Ev. (8th Am. Ed.) 29.

⁶ Best, Ev. 419.

⁷ Best, Ev. 416 ; 1 Roscoe Cr. Ev. (8th Am. Ed.) 29.

months after her husband had left the country, the presumption of innocence was held to preponderate over the usual presumption of the continuance of life.¹ But this case was much commented on in a later case,² where it was held that a man having some years before married one woman, who was shown to have been alive on the 17th March, 1831, and another woman on the 11th April of that year, the sessions were justified in presuming the first wife to have been alive and the second marriage void. Lord Denman, C. J., said that there was no rigid presumption of law without reference to the accompanying circumstances, and the presumption of innocence could not prevail against proof that the first wife was alive shortly before. It is to be observed that the two cases differed so much as fully to justify the court of sessions in coming to opposite conclusions upon them.

Upon the trial of an action for money had and received,³ in order to try the plaintiff's right to a donative, it was held unnecessary for him to prove at the trial, although called upon to do so, that he had subscribed the articles of the church, in the presence of the ordinary, or publicly read the same, or that he had subscribed the declaration of uniformity contained in the statute.⁴ And where the plaintiff sued for titles, the defendant pleaded that the plaintiff had not read the articles according to the statute, and the court constrained the defendant to prove the negative; and Coke said that if such a matter should come before him in evidence, he would presume, until the contrary should be proved, that the plaintiff had read the articles.⁵ Upon an information for refusing to deliver up the rolls of the Auditor of the Exchequer, the Court of Exchequer put plaintiff upon proof of the negative.⁶ In an action for putting combustible matter on board the plaintiff's ship without giving notice of its contents, when the ship was destroyed, it was held that the plaintiff was bound to prove the want of notice.⁷

¹ *Rex v. Twynning*, 2 B. & Ald. 886.

² *Rex v. Harborne*, 2 Ad. & E. (29 E. C. L.) 541.

³ *Powell v. Milburn*, 8 Wils. 855.

⁴ 13 and 14 Chas. II. c. 4.

⁵ *Monke v. Butler*, 1 Roll. R. 88. See *Stark Ev.* (10th Am. Ed.) 755, n. "This presumption of innocence is so strong that even where the guilt can be established only by proving a negative, that negative must in most cases be proved by the party alleging the guilt." 1 Greenl. Ev. § 85.

⁶ *Lord Halifax's Case*, B. N. P. 298.

⁷ *Williams v. East India Co.*, 3 East, 192.

Upon an information in the nature of *quo warranto*, when the objection was that the defendant had not taken the sacrament within a year, the court held that the presumption was that he had conformed to the law.¹ When a marriage *de facto* is proved, the presumption is that the marriage was conducted according to law, and the burden of proof is on the party denying it.² When the plaintiff in ejectment claims the right to enter upon lands for the breach of a condition subsequent, the burden is upon him to prove the breach.³ The averment of neglect of official duty must be supported by some proof by the party making it.⁴

¹ *Rex v. Hawkins*, 10 East, 211.

² *Raynham v. Canton*, 3 Pick. 393.

³ *O'Brien v. Doe*, 6 Ala. 787.

⁴ *Dobbs v. Justices*, 17 Ga. 624. But in such a case very little evidence will suffice to shift the burden of proof.

CHAPTER II.

THE CREDIBILITY OF TESTIMONY.

ARTIFICIAL rules for determining the credibility of testimony should generally be avoided. Jurors who observe the witness while he is testifying, his manner, his intelligence, his appearance, his bias or the absence of it, and many other nameless *indicia*, are as a rule the best determiners of the truth or falsity of parol testimony.¹ And it would be foreign to the subject of this work to discuss the considerations which affect the credibility of evidence in general, such as the integrity, disinterestedness, and ability of the witnesses,² the consistency of their testimony, its conformity with experience, and its agreement with collateral circumstances, since these considerations apply to circumstantial only in common with all other testimonial evidence. It has been profoundly observed, that of all the various sources of error, one of the most copious and fatal is an unreflecting faith in human testimony;³ and it is obvious that all reasoning upon the relevancy and effect of circumstantial evidence presupposes its absolute verity, and that such evidence necessarily partakes of the infirmities incidental to all human testimony; and facts apparently indicative of the most forcible presumption have been fabricated and supported by false testimony. Every consideration, therefore, which detracts from the credibility of evidence in the abstracts, applies *à fortiori* to evidence which is essentially indirect and inferential. In such cases, falsehood in the minutest particular throws discredit upon every part of a complainant's statement, according to the well-known maxim, *qui mendax in uno mendax in omnibus*.

¹ STONE, C. J., in *Dick v. State*, 87 Ala. 61.

² See, on these points, *State v. Wisdom* (Mo.), 24 S. W. 1047; *State v. Miller*, 9 Houst. 564; *Housh v. State* (Neb.), 61 N. W. 571; *Reagan v. U. S.*, 157 U. S. 301; *Johnson v. U. S.*, 157 U. S. 320.

³ 1 Stewart's Collected Works, 247.

The presumption that the witness will declare the truth ceases as soon as it manifestly appears that he is capable of perjury.

But this applies only where it appears that the witness has wilfully and intentionally testified falsely. Instructions which omit this element are incorrect.¹ Hence, since facts can never be mutually inconsistent,² circumstantial evidence frequently affords the means of evincing the falsehood of direct and positive affirmative testimony, and even of disproving the existence of the *corpus delicti* itself, by manifesting the incompatibility of that testimony with surrounding and concomitant circumstances, of the reality of which there is no doubt.³ The testimony of a false witness must either be sparing in circumstances, and therefore of a nature obviously suspicious, or be liable to detection from comparing the invented circumstances with each other and with those which are known to be true. The jury are not bound to accept as true the testimony of a witness which there is no direct testimony to contradict when it contains inherent imperfections.⁴

Circumstantiality of detail is usually a test of sincerity, provided the circumstances be of such a nature as to be capable of contradiction if they be false. And if a witness be copious in his detail of circumstances which are incapable of contradiction, but sparing of those which are of an opposite kind, his testimony must necessarily be regarded with a degree of suspicion.

Nor, on the other hand, must it be forgotten, as has been well remarked, that "the usual character of human testimony is substantial truth under circumstantial variety." "It so rarely happens," says Starkie, "that witnesses of the same transaction perfectly and entirely agree in all points connected with it, that an entire and complete coincidence in every particular, so far from strengthening their credit, not unfrequently engenders a suspicion of practice and concert."⁵

¹ *Stoppert v. Nierle* (Neb.), 68 N. W. 382. See further on this matter, *Paul v. State* (Ala.), 14 So. 634; *Alton Lime & C. Co. v. Calvey*, 47 Ill. App. 343.

² Locke on Human Understanding, b. iv. c. 20, § 8.

³ Best on Presumptions, 54.

⁴ *Lang v. Ferrant*, 55 Minn. 415.

⁵ See Starkie on Ev. (10th Am. Ed.) 831. "I know not," says Dr. Paley, "a more rash or unphilosophical conduct of the understanding than to reject the substance of a story by reason of some diversity in the circum-

Sir Matthew Hale mentions a very remarkable case, where an elderly man was charged with violating a young girl of fourteen years of age, but it was proved beyond all doubt that a physical infirmity rendered the perpetration of such a crime utterly impossible.¹ The prosecutrix of an indictment against a man for administering arsenic to her, to procure abortion, deposed that he had sent her a present of tarts, of which she partook, and that shortly afterwards she was seized with symptoms of poisoning. Amongst other inconsistencies, she stated that she had felt a coppery taste in the act of eating, which it was proved that arsenic does not possess; and from the quantity of arsenic in the tarts which remained untouched, she could not have taken above two grains, while after repeated vomitings, the alleged matter subsequently preserved contained

stances with which it is related. The usual character of human testimony is substantial truth under circumstantial variety. This is what the daily experience of courts of justice teaches. When accounts of a transaction come from the mouths of different witnesses, it is seldom that it is not possible to pick out apparent or real inconsistencies between them. These inconsistencies are studiously displayed by an adverse pleader, but oftentimes with little impression upon the minds of the judges. On the contrary, a close and minute agreement induces the suspicion of confederacy and fraud. When written histories touch upon the same scenes of action, the comparison almost always affords ground for a like reflection. Numerous and sometimes important variations present themselves; not seldom, also, absolute and final contradictions; yet neither the one nor the other are deemed sufficient to shake the credibility of the main fact. The embassy of the Jews to deprecate the execution of Claudius' order to place his statue in their temple, Philo places in harvest, Josephus in seed-time; both contemporary writers. No reader is led by their inconsistency to doubt whether such an embassy was sent or whether such an order was given. Our own history supplies examples of the same kind; in the account of the Marquis of Argyle's death in the reign of Charles the Second, we have a very remarkable contradiction. Lord Clarendon relates that he was condemned to be hanged, which was performed on the same day; on the contrary, Burnet, Woodrow, Heath, and Eckard concur in stating that he was beheaded, and that he was condemned upon the Saturday, and executed upon the Monday. Was any reader of English history ever sceptic enough to raise a doubt whether he was executed or not?" To take an illustration from our own times, in the Gettysburg address of President Lincoln. That there was such an address, and the circumstances of its delivery, are matters of common knowledge. Yet those who were near the person of Mr. Lincoln differ in their accounts of the time and manner of preparation of the address. No one has yet been found so foolhardy as to declare the battle of Waterloo a myth of the historians. Yet the narratives differ in many of the details of that tremendous struggle.

¹ 1 P. C. c. 58.

nearly fifteen grains, though the matter first vomited contained only one grain. The prisoner was acquitted, and the prosecutrix afterwards confessed that she had preferred the charge from motives of jealousy.¹

Where the chief witness on a trial for murder was an accomplice, it was held proper to show that the witness had made threats against the deceased for talking about his sister, as this would tend to prove that his conduct in killing deceased was dictated by his own personal malice, independently of the instigation of the defendant, and to this extent would suggest a possible hypothesis inconsistent with his own statement.² In an old case it was shown that the witness had threatened to be revenged on his master, the defendant, by sending him to jail.³ This has been followed in a very recent case where the defendant was on trial for forging entries in a weigh-sheet at a colliery with intent to defraud. The prosecution depended for conviction on the testimony of a witness who stated that while concealed in the roof of the office, he saw the defendant make the false entries. It was allowed to be shown that the witness had two years previously threatened to be revenged on the prisoner, saying: "It is in my power to do him a good one, and when I do him it will be a good one."⁴

¹ Reg. v. Whalley, York Spring Assizes, 1829; Christison on Poisons, 95.

² Matler v. State, 67 Ala. 55; 42 Am. Rep. 95.

³ Rex v. Yewin, 2 Camp. 638, n.

⁴ Reg. v. Shaw, 16 Cox C. C. 583.

CHAPTER III.

CONDUCT OF THE COMPLAINING PARTY AS GIVING RISE TO THE PRESUMPTION OF INNOCENCE.

IRRESPECTIVELY of and distinct from any positive discrepancy in the account given by a complainant party, there is a consistency of deportment and conduct grounded upon the invariable laws of our moral nature, which is essentially characteristic of truth and honesty, and the absence of which necessarily detracts from the credit of such evidence, and therefore tends to create a counter-presumption. We reasonably expect to discover in the *demeanor* of a party who has just reason to complain of personal injury or violated honor or right, prompt and unequivocal indications of that sense of wrong and insecurity, which, as the invariable consequence, is naturally and involuntarily generated in every human mind.

In trial for rape the conduct of the prosecutrix immediately after the transaction is properly the subject of scrutiny.¹ That she made complaint immediately after the alleged assault is a circumstance corroborative of her statement at the trial that such an assault was made.² In determining the credit to be given to her testimony various circumstances must be considered: *e. g.*, her character, whether she immediately told of the offence if she had opportunity to do so, whether she might have been heard at the time of the outrage, and yet made no outcry, whether she be supported by other evidence, whether the accused fled.³

An outcry and resistance are important elements of evidence and a want of these circumstances where they may reasonably be expected go far to disprove the charge of rape.⁴ A concealment of the injury where there is an opportunity for early disclosure, may lead to a like inference.⁵

¹ *People v. Flynn*, 95 Mich. 276.

² *Bean v. People*, 124 Ill. 576.

⁴ *State v. Cunningham*, 100 Mo. 525.

³ *Lynn v. Com.*, 13 S. W. 74.

⁵ *State v. Witten*, 13 S. W. 871.

Sir Matthew Hale, in reference to this crime, says: "If the party concealed the injury for any considerable time after she had opportunity to complain; if the place where the fact was supposed to be committed were near to inhabitants, or common recourse or passage of passengers, and she made no outcry when the fact was supposed to be done, when and where it is probable that she might be heard by others; these and the like circumstances carry a strong presumption that her testimony is false or feigned."¹

These cautionary considerations are applicable with more or less of force to accusations of every description; but they are more especially weighty and pertinent in reference to the particular crime referred to, of which the learned author from whom we have just quoted has said, that "it is an accusation easily to be made, and hardly to be proved, and harder to be defended by the party accused, though never so innocent."² Such cases, he further observes, are not uncommon, and he has related the particulars of two cases, where, though the charges were groundless, the parties with difficulty escaped. "I only mentioned these instances," said that upright judge, "that we may be the more cautious upon trials of offences of this nature, wherein the court and jury may with so much ease be imposed upon, without great care and vigilance, the heinousness of the offence many times transporting the judge and the jury with so much indignation, that they are over-hastily carried to the conviction of the persons accused thereof by the confident testimony sometimes of malicious and false witnesses."³

On a prosecution for carnally knowing a child, the defendant was permitted to show that at the time the offence was alleged to have been committed the physical system of the accused was greatly weakened and debilitated by drink, as tending to show that he was not capable of committing it.⁴

False charges of this kind have unhappily been too common and too successful in all ages. The social consequences of female dishonor are so deadly, and the inducements to falsehood and revenge so peculiar and so powerful, that there is no class of cases in which it is more important to obtain an exact knowledge of the motives and character of the complainant. For these reasons great latitude of cross-examination is per-

¹ 1 Hale's P. C. c. 58.

² Ibid.

³ 1 Hale's P. C. c. 58.

⁴ Nugent v. State, 18 Ala. 531.

mitted in cases of this kind. The prosecutrix may be cross-examined to prove her unchaste.¹ She may be asked whether she did not have sexual intercourse with a designated person at a specified time and place.² In New York she will be compelled to answer, and if she answers in the negative she may be contradicted.³ Evidence that the woman charged to have been injured is in fact a common prostitute, or evidence of reputation that she is a woman of ill-fame, may be submitted to the jury to impeach her credibility and to disprove her statement that the attempt was forcible and against her consent.⁴

It is material to show that the prosecutrix has previously sustained criminal relations with the prisoner ;⁵ otherwise, particular instances of her unchaste conduct may not be shown.⁶

Nor is the danger of false accusation confined to the particular class of offences which has been specially adverted to. Inducements to prefer false charges may operate with greater or lesser force with regard to accusations of every kind. Two women were capitally convicted of robbing a young girl named Canning, and afterwards confining her under circumstances of great cruelty for twenty-nine days without sustenance, except a quartern loaf and a pitcher of water. Public odium was intensely excited against the prisoners, and they very narrowly escaped execution, and yet it was clearly ascertained that the charge was a fabrication in order to conceal the prosecutrix's misconduct during the period of her absence from her master's house.⁷ Canning was afterwards convicted of perjury, and sentenced to be transported; and upon her trial thirty-eight witnesses, most of them unconnected with each other, spoke to the identity of one of her unfortunate victims, and proved

¹ *State v. Murray*, 63 N. C. 31.

² *State v. Reed*, 39 Vt. 417.

³ *Brennan v. People*, 7 Hun, 171; otherwise in England, *Rex v. Holmes*, L. R. 1 C. C. R. 334.

⁴ *Camp v. State*, 3 Ga. 419; *State v. Forshner*, 43 N. H. 89; *State v. White*, 35 Mo. 500; *Pratt v. State*, 19 Ohio St. 217; *Reg. v. Clay*, 5 Cox C. C. 146; *Reg. v. Sissington*, 1 Cox C. C. 48; *Reg. v. Dean*, 6 Id. 23; *Reg. v. Rooke*, 6 Id. 196.

⁵ *Reg. v. Riley*, 16 Cox C. C. 191. See also *People v. Benson*, 6 Cal. 221; *People v. Jackson*, 3 Park. C. R. 891.

⁶ *State v. Forshner*, 43 N. H. 89; *State v. Knapp*, 45 N. H. 148; *Dorsey v. State*, 1 Tex. Crim. App. 33; *Woods v. People*, 55 N. Y. 515; *Com. v. Regan*, 105 Mass. 193.

⁷ *Rex v. Squires & Wells*, 19 St. Tr. 275.

a circumstantial *alibi*.¹ Nine persons were convicted on a charge of conspiracy to carry off from the house of her guardian a young lady of seventeen years of age, in order to procure her clandestine marriage with a young man of low condition for whom she had formed an attachment, and with whom she had indulged in vulgar familiarities. She gave her testimony in a manner apparently so artless and ingenuous that she greatly prepossessed the judge, and so favorably impressed the jury that they stopped the prosecutor's counsel when about to reply, and returned a verdict of guilty.² Her story was nevertheless discovered to be a fabrication, for the purpose of extricating herself from the shame of her levity and misconduct, and she, as well as a witness who had corroborated her story, were afterwards convicted of perjury.³ Miscreants, and among them even the inferior ministers of the law, have concocted and procured the commission of robbery and other crimes for the purpose of obtaining the pecuniary rewards formerly given by act of Parliament for the apprehension and conviction of offenders.⁴

It is frequently, therefore, of the highest importance to investigate the motives of the complainant party, and to ascertain whether they are such as may have led to the institution of a false charge. The just course of inquiry in such circumstances was thus laid down by Mr. Justice Coltman. "The jury," he said, "had nothing to do with the prosecutor's motives, except so far as, if it should appear that there was any motive for the prosecution, of an unworthy character, made out, it would then be their duty to watch such a case much more narrowly than one in which no such motive appeared. Even in that case, however, if the evidence satisfied them of the truth of the charge, they had no right to look at the motives that had induced the prosecutor to prefer it, but were bound to say that the accused person was guilty."⁵

¹ *Rex v. Canning*, 19 St. Tr. 667.

² *Rex v. Bowditch and others*, Dorchester Summer Ass., 1818, coram Mr. Justice PARK, Short-hand Rep.

³ *Rex v. Whitby*, and *Rex v. Glenn*, K. B. Guildhall, Oct. 1820.

⁴ *Rex v. M'Daniel and others*, Foster's Rep. 121; *Rex v. Vaughan and others*, Sessions Papers, 1816; *Reg. v. Delahunt*, Dublin, 1842; cited in Best's Princ., *ut supra*, 583.

⁵ *Reg. v. Coyle*, C. C. C., Oct. Sess., 1851.

CHAPTER IV.

THE CONDUCT OF THE ACCUSED AS RAISING A PRESUMPTION OF INNOCENCE.

A PRESUMPTION of innocence may be created by the language, conduct, and demeanor of the party charged with crime; and it is upon this principle that the ingenuous and satisfactory explanation of circumstances of suspicion always operates in favor of the accused. Mr. Justice Earle said he thought it was extremely important, as much for the protection of innocence as for the discovery of guilt, that the accused should have an opportunity of making a statement;¹ and the Lord Justice Clerk, in a Scotch case, said that the declaration of a prisoner, if fairly given, and founded in truth, often had a very favorable effect.²

It is evident, however, that this kind of presumption must be attended with much uncertainty, and in its application require the exercise of great circumspection. A prisoner was not allowed to prove that when he heard of the murder of which he was accused he appeared surprised, the court saying that he could no more make his appearance or conduct evidence than he could his declarations or admissions.³ The deportment of innocence may be simulated, and from the anomalies of human nature, it may be difficult if not impracticable in some cases to determine what is the natural and suitable conduct to be expected from a party influenced by the pressure of an accumulation of circumstances at once threatening and fallacious. It is certain that innocent persons have drawn upon themselves the punishment of crime by conduct apparently consistent only with guilt, but which has erroneously been resorted to as likely to divert or repel unjust suspicion; of which an instructive case

¹ *Reg. v. Baldwin*, 21 L. J. M. C. 130.

² *Rex v. Wishart*, 1 Syme's Jud. Rep. App. 23.

³ *Campbell v. State*, 23 Ala. 44.

is mentioned by Sir Edward Coke.¹ "In the county of Warwick," says he, "there were two brethren; the one having issue a daughter, and being seized of lands in fee, devised the government of his daughter and his lands until she came to her age of sixteen years, to his brother, and died. The uncle brought up his niece very well, both at her book and needle, etc., and she was about eight or nine years of age; her uncle for some offence correcting her, she was heard to say, 'Oh! good Uncle, kill me not!' After which time the child, after much inquiry, could not be heard of, whereupon the uncle, being suspected of the murder of her, the rather that he was her next heir, was upon examination, anno 8 Jac. Regis, committed to the jail for suspicion of murder; and was admonished by the justices of assize to find out the child, and thereupon bailed until the next assizes. Against which time, for that he could not find her, and fearing what would fall out against him, he took another child, as like unto her, both in person and years, as he could find, and apparelled her like unto the true child, and brought her to the next assizes; but upon view and examination she was found not to be the true child; and upon these presumptions he was indicted, found guilty, had judgment, and was hanged. But the truth of the case was, that the child, being beaten over-night, the next morning, when she should go to school, ran away into the next county; and being well educated she was reared and entertained of a stranger; and when she was sixteen years old, at which time she should come to her land, she came to demand it, and was directly proved to be the true child." The learned author adds, "We have reported this case for a double caveat; first, to judges, that they in cases of life judge not too hastily upon bare presumption, and secondly, to the innocent and true man, that he never seek to excuse himself by false or undue means, lest thereby he, offending God (the author of truth), overthrow himself as the uncle did."

From the foregoing considerations it follows that our judgments in regard to the conduct of parties under accusation for crime must occasionally be modified by allowances for human weakness and inconsistency, which can in no degree be admitted as qualifying the obligation of entire truthfulness and

¹ Third Inst. c. 104, 282.

consistency justly exacted from those who voluntarily become the accusers of others.

Since falsehood, concealment, flight, and other like acts are generally regarded as indications of conscious guilt, it naturally follows, that the absence of these marks of mental emotion, and still more a voluntary surrender to justice, when the party had the opportunity of concealment or flight,¹ must be considered as leading to the opposite presumption; and these considerations are frequently urged with just effect, as indicative of innocence; but the force of the latter circumstance may be weakened by the consideration that the party has been the object of diligent pursuit,² or, as said by Lord Campbell, though the party may have abstained from flight from a sense of innocence, he may have done so from thinking that, from the course he had taken, nothing would be discovered against him.³ One indicted for murder set up that he had done the shooting in self-defence, and relied on the fact that he had surrendered himself as indicating the truth of his defence, but the court said that the prisoner, knowing the shooting had been witnessed, chose rather to surrender himself than to flee the country, thinking that, perhaps, by the oaths of himself and his companions, true or untrue, he could establish his contention.⁴

It must be also remembered that flight and other similar indications of fear may be referable, not to the precise offence charged, but to other circumstances, as to disordered affairs,⁵ or to guilt of another and less penal character than that involved in the particular charge.⁶

¹ Menochius, *ut supra*, lib. v. pr. 50.

² *Rex v. Bulsh*, 1 Syme's Justiciary Rep. 277.

³ *Reg. v. Palmer*, Short-hand Report, *ut supra*, 810.

⁴ *Barnards v. State*, 88 Tenn. 181.

⁵ *Rex v. Crossfield*, 26 St. Tr. 217.

⁶ *Rex v. Scofield*, 81 St. Tr. 1061. And see the language of TINDAL, C. J., in *Rex v. Frost*, Gurney's Rep. 766, 749; and of the Lord Justice Clerk BOYLE, in *Rex v. Hunter*, and others, Court of Justiciary, 1888, Short-hand Report, 868.

CHAPTER V.

THE EFFECT OF THE ABSENCE OF APPARENT MOTIVE TO COMMIT THE CRIME CHARGED.

SINCE an action without a motive would be an effect without a cause, a presumption is consequently created in favor of innocence from the absence of all apparent inducement to the commission of the imputed offence.¹ In a case depending mainly on circumstantial evidence it was said that the want of motive was an important consideration bearing upon the probability in regard to guilt.² But a request to charge that the absence of motive on the part of the defendant for the commission of the crime charged might be considered by the jury as favorable to the defendant was held by the Supreme Court of Georgia to have been properly refused.³ The investigation of human motives is often a matter of great difficulty, from their latency or remoteness; and experience shows that aggravated crimes are sometimes committed from very slight causes, and occasionally even without any apparent or discoverable motive. It is impossible to see the operations of the human mind. The character, instincts, and intents of persons differ so that what might be an adequate motive for one for a certain act will not be for another.⁴ This particular presumption would, therefore, seem to be applicable only to cases where the guilt of the individual is involved in doubt; and the consideration for the jury in general is rather whether upon the other parts of the evidence the party accused has committed the crime, than whether he had any adequate motive.⁵

And while absence of motive for the crime may be considered

¹ This was a point strenuously insisted on by the defence in the late famous Durant case. See article on the Durant case by Prof. Jno. H. Wigmore, *Am. L. Rev.* vol. xxx. No. 1, p. 29.

² *People v. Paolick*, 7 N. Y. Cr. R. 80.

³ *Moore v. State*, 64 Ga. 449.

⁴ See remarks of PLATT, J., in *People v. Rubensteine*, N. Y. Oyer and Term. See *Rice Cr. Ev.* § 344.

⁵ See Mr. Justice ABBOTT's charge in *Rex v. Donnell*, Rep., *ut supra*, 130. 248

where guilt is doubtful, it is immaterial where the proof of guilt is satisfactory to the jury.¹ In a recent case² a defendant party's motives, even where they are unquestionably of a criminal character, may nevertheless be susceptible of different interpretations, and indicative of very different degrees of moral and legal turpitude. Concealment of the death of an illegitimate child and the clandestine disposal of its body, for instance, may be accounted for, either by a purpose to suppress evidence of a murder, or merely by the desire of preserving the reputation of female chastity.

The fact that one accused of homicide knows where the body of the murdered person is concealed, while it may demonstrate the fact that he was cognizant of the murder, does not prove that he committed the deed, or even that he was an accomplice, but is only circumstantial evidence from which guilt may be inferred, and does not reasonably exclude every other hypothesis, and is not sufficient to convict.³

Where a woman was indicted jointly with her husband for receiving stolen property, knowing it to have been stolen, and it appeared that she had dealt with it and ultimately destroyed it, it was held to be a question for the jury whether she had so received and dealt with it to aid him in turning it to profit, or merely to conceal his guilt, or screen him from the consequences.⁴ So where a wife attempted to break up coining implements at the time of her husband's apprehension, it was held that if done with the object of screening him, it was no evidence of a guilty possession by her.⁵ And where a man and his wife were found guilty of wounding a person with intent to disfigure him and to do him grievous bodily harm, but the jury found that the wife acted under the coercion of the husband and did not personally inflict any violence on the prosecutor, it was held by the Criminal Court of Appeal that the conviction against the wife could not be supported.⁶ In all such cases, every sound principle of interpretation and judgment requires, that in the absence of contrary proof the act shall be referred to the operation of the least guilty motive; conformably to the

¹ *State v. Miller*, 9 Houst. 564.

² *Stone v. State* (Ala.), 17 So. 114.

³ *Elizabeth v. State*, 27 Tex. Crim. App. 329.

⁴ *Reg. v. M'Clarens*, 8 Cox's C. C. 425; *S. P. Reg. v. Brookes*, 6 Id. 147.

⁵ *Reg. v. Boober*, 5 Cox's C. C. 272.

⁶ *Reg. v. Smith and wife*, 27 L. J. M. C. 204.

*maxim, præsumptio judicatur potentior quæ est benignior.*¹ Of this evident principle of justice the old English statute 21 Jac. I., c. 27 (now no longer in force), which made the concealment of the death of an illegitimate child by its mother a conclusive presumption of murder, unless she could make proof by one witness, at least, that the child was born dead, was a flagrant violation. It is on this principle that, when a special intent is made by statute an essential ingredient of any offence, as in the cases of assault with intent to murder, or to rob, or to commit a felony, or to prevent lawful apprehension or detainer, such special intent must be proved by direct evidence or by circumstances which necessarily or reasonably lead to the inference of such intention. Thus a charge of the statutable offence of throwing upon or otherwise applying to any person any corrosive fluid or other destructive matter, with intent to burn, maim, or do some bodily harm, is not sustained by proof of throwing a corrosive fluid for the purpose of burning the clothes.² And on the trial of a man for throwing a stone at a railway carriage with intent to endanger the safety of the passengers, where it appeared that the prisoner threw a stone just as the train was setting off, at a passenger against whom he had been much excited, Mr. Justice Erle told the jury that they must be satisfied that the intent to endanger the safety of any person travelling by the railway must have been an intent to inflict some grievous bodily harm, and such as would sustain an indictment for assaulting or wounding a person with intent to do some bodily harm; but that as that is a question of degree, which it is impossible to define further than in those terms, it must be a question for the jury upon the facts whether there had been such an intent.³

The *prima facie* presumption in favor of innocence, from the absence of all apparent motive, is greatly strengthened where all inducement to the commission of the imputed crime is opposed by strong counteracting motives; as where a party indicted for arson with intent to defraud an insurance office had furniture on the premises worth more than the amount of his insurance,⁴ or where a party accused of murder had a direct

¹ Menoch. *ut supra*, lib. v. pr. 29.

² Reg. v. Coppard, Kingst. Wint. Ass., 1855, coram Mr. Justice CROMPTON; and see Reg. v. Coke and Woodburne, *ut supra*.

³ Reg. v. Rooke, 1 F. & F. 107.

⁴ Reg. v. Bingham, Horsham Spr. Ass., 1811.

interest in the continuance of the life of the party supposed to have been murdered.¹ *A fortiori* would this presumption seem to apply where the life of the suspected party has been endangered, as the consequence of the supposed criminal act; as where a party charged with murder by poisoning had herself partaken of the poisoned food:² but this circumstance, of apparently favorable presumption, may have been resorted to as an artifice to avert suspicion, especially if the quantity taken has not been sufficient seriously to endanger life.³

¹ *Rex v. Downing, infra.*

² *Reg. v. Hawkins*, Stafford Summer Ass., 1839.

³ *Rex v. Wescombe*, and *Rex v. Nairn, ut supra*, 90. And see *Rex v. Fenning*, coram the Recorder of London, Sess. Papers, 1815, *infra*.

CHAPTER VI.

DECLARATIONS AND THREATS OF THE DECEASED.

THE importance of declarations of the defendant as indicating a disposition to commit the act charged has been dwelt upon in an earlier chapter. But in murder trials it frequently happens that the defendant claims that he committed the act in self-defence. In such cases evidence that the deceased had made threats indicating an angry and revengeful spirit towards the prisoner, and a determination to attack him, is admissible. Such evidence is introduced for the purpose of throwing light upon the attitude of the parties towards each other,¹ the reasonableness of the defendant's fears,² and as tending to show that the deceased was the aggressor.³

But evidence of antecedent threats is inadmissible in behalf of the defendant to support a plea of self-defence where there has been no evidence of any overt act by the deceased.⁴ And such overt act must consist of a hostile demonstration of such a character as to impress on the defendant the imminence of the danger of loss of life or great bodily harm.⁵ But it is sufficient if there is the slightest evidence tending to show a hostile demonstration which may reasonably be regarded by the accused as placing him in imminent danger of life or of great bodily harm.⁶

As to the admissibility of evidence of threats by the deceased not communicated to the defendant previous to the fatal affray, the decisions have not been uniform; but by the

¹ *Dupree v. State*, 33 Ala. 380; 73 Am. Dec. 422; *State v. Evans*, 33 W. Va. 417; *Wood v. State*, 92 Ind. 269.

² *Karr v. State* (Ala.), ; 14 So. 851; *Pitman v. State*, 22 Ark. 354.

³ *Basye v. State* (Neb.), 63 N. W. 811; *Cannon v. State*, 60 Ark. 564.

⁴ *Hill v. State* (Miss.), 16 So. 901; *State v. King*, 47 La. Ann. 28; *State v. Vallery*, 47 La. Ann. 182; *Green v. State*, 69 Ala. 6; *Serr v. Campbell*, 9 Mont. 16.

⁵ *State v. Stewart*, 47 La. Ann. 252

⁶ *Garner v. State*, 28 Fla. 113.

weight of modern authority, it seems that evidence of communicated threats is admissible for several purposes. The remarks of Mr. Justice Grover, in *Stokes v. People*, are sufficiently valuable to merit an extended quotation. The learned Judge said:—"Evidence of threats made by the deceased, which had been communicated to the accused, was received by the court. Proof of the latter facts was competent, as tending to create a belief in the mind of the accused that his life was in danger, or that he had reason to apprehend some great bodily harm from the acts and motions of the deceased, when, in the absence of such threats, such acts and motions would cause no such belief. But why admissible upon this ground? For the reason that threats made would show an attempt to execute them probable when an opportunity occurred, and the more ready belief of the accused would be justified to the precise extent of this probability. But an attempt to execute threats is equally probable, when not communicated, to the party threatened as when they are so; and when, as in this case, the question is whether the attempt was in fact made, we can see no reason for excluding them in the former that would not be equally cogent for the exclusion of the latter, the latter being admissible only for the reason that the person threatened would the more readily believe himself endangered by the probability of an attempt to execute such threats. Threats to commit the crime for which a person is upon trial are constantly received as evidence against him, as circumstances proper to be considered in determining the question whether he has, in fact, committed the crime, for the reason that the threats indicate an intention to do it, and the existence of this intention creates a probability that he has in fact committed it. Had the deceased, just previous to this going into the hotel where the transaction occurred, declared that he was going there to kill the accused, and that he was prepared to execute this purpose, we think the evidence would have been competent upon the question whether he had in fact made the attempt when that question was litigated. And yet there is in principle no difference between this and the testimony offered and rejected. The difference is only in degree."¹

And an examination of the authorities discloses that threats

of the deceased not communicated to the defendant are received in evidence for the following purposes :

1. As corroborative and explanatory of communicated threats ;¹

2. To prove the state of feeling entertained by the deceased towards the accused ;²

3. To throw light upon the inquiry as to who began the affray.³

¹ *Holler v. State*, 87 Ind. 57 ; 10 Am. Rep. 74 ; *State v. Williams*, 40 La. Ann. 168.

² *Keener v. State*, 18 Ga. 194 ; 63 Am. Dec. 269.

³ *State v. Bailey*, 94 Mo. 311 ; *Sparks v. Com.*, 89 Ky. 644 ; *Potter v. State*, 85 Tenn. 88. See *Wilson v. State* (Fla.), and note thereto, 17 L. R. A. 654.

CHAPTER VII.

THE EXPLANATION OF UNFAVORABLE CIRCUMSTANCES.

As is the case with other presumptions, so the inference of guilt from the recent possession of stolen property may be rebutted by circumstances which create a counter-presumption: as where the property is found in the prisoner's possession under circumstances which render it more probable that some other person was the thief. Therefore, where, on the trial of a mother and her two sons for sheep-stealing, it was proved that the carcass of a sheep was found in the house of the mother, it was considered that the presumption arising from the possession of the stolen property immediately after the theft was rebutted so far as respected her, by the circumstance that *male* footsteps only were found near the spot from which the sheep had been stolen.¹ A woman was tried for the larceny of five saws which had been stolen from the workshop of a hat-block turner during the night. There was a hole in the building large enough for a person to have crept through it. On the following day he pledged two of the saws with a pawnbroker in the neighborhood. On the following night the house of the prosecutor was broken open and a number of articles stolen, and no communication existed between the house and the workshop. Two days afterwards the prisoner was taken into custody for this theft, in the house of a man who was himself charged with having committed the burglary. Mr. Baron Gurney said it was improbable that the female should have taken these saws, but that it was extremely probable that she should have been employed by another person to pawn them; that it was hardly a case in which the general rule could apply, and that it would be safer to acquit the prisoner.² Circumstances of conduct also may repel this *prima facie* presumption; as where the

¹ *Rex v. Arundel and others*, 1 Lewin's C. C. 115.

² *Rex v. Collier*, 4 Jurist, 708.

prisoner, a few days after the robbery of a large quantity of plate in London, sold to a dealer in gold and silver some silver articles marked with the prosecutor's crest partially obliterated, which had formed part of the stolen property. Mr. Baron Bramwell said it was a circumstance in the prisoner's favor that he had disposed of the silver at a place where he had been known for several years, and had been in the habit of bringing gold and silver for sale, and did not appear to have made any attempt at secrecy. The prisoner was acquitted.¹

Circumstances of apparently the most unfavorable presumption may be susceptible of an explanation consistent with the prisoner's innocence, and really be irrelevant to the particular inference sought to be derived from them;² or they may be opposed by circumstances which weaken or neutralize, or even repel the imputed presumption, and induce a stronger counter-presumption,³ to every allegation of the existence of which justice demands that dispassionate and candid consideration be given. On the trial of a shoemaker for the murder of an aged female, it appeared that his leathern apron had several circular marks made by paring away superficial pieces, which it was supposed had been removed as containing spots of blood, but it was satisfactorily proved that the prisoner had cut them off for plasters for a neighbor.⁴ A policeman on his examination before the coroner, where the question was, whether a young woman had been murdered or had committed suicide, swore that a piece of rope found in the prisoner's box appeared to have been cut from the same piece that was round the neck of deceased; but on the trial he acknowledged that he had been mistaken; the two pieces of rope had in the interim been examined by a rope-maker, and were found not to correspond, one piece being twisted to the right, and the other to the left.⁵ The prisoner was convicted upon the general evidence, and executed. Two men were tried for killing a sheep with intent to steal the carcass. The prosecutor had three sheep on a common, on the 14th of December, on which evening the prisoners, one of whom had a gun, were seen near the common driving several sheep before them. One of the witnesses, when near

¹ Reg. v. Benjamin, C. C. C., June, 1858.

² Rex v. Thornton, Rex v. Looker, *infra*.

³ Ibid.

⁴ Rex v. Fitter, before Mr. Justice TAUNTON, Warwick Summer Ass., 1834.

⁵ Reg. v. Drory, coram CAMPBELL, L. C. J., Chelmsford Spr. Ass., 1851.

the prosecutor's house, heard the report of a gun in the direction of the common, and, having a suspicion of the object of the prisoners, went to the prosecutor's house and communicated his suspicion, in consequence of which the prosecutor and the witness went to the common on which the sheep had been left feeding, and discovered that one of them was not there. The prisoners were apprehended the same night at their respective homes. In the lodgings of one of the prisoners a gun was found which had been recently fired, and some shot and powder wrapped in a piece of newspaper, from which two small pieces had been torn; and upon the person of the other prisoner a knife was found discolored with blood. No traces were found of the lost sheep at that time, but the next day the carcass was found, concealed by fern, on the common; the sheep had been shot and also stuck in the neck. Two days afterwards, on searching near the spot where the carcass was found, two small pieces of newspaper were discovered, singed and bearing marks of having been fired from a gun, which on comparison were found to be the identical pieces so torn from the paper in question. Notwithstanding these apparently conclusive circumstances, the jury acquitted the prisoners, as it appeared from the cross-examination of one of the witnesses that he had seen them shooting on the common on the previous Sunday.¹ A man was tried for murder on Harwich Moor, under circumstances which were extremely suspicious; but the presumption against him was greatly weakened, if not entirely destroyed, by the circumstance that six shots extracted from the deceased's brain all corresponded in weight with the shot known as No. 3, while the shot in the prisoner's bag contained a mixture of Nos. 2 and 3, and the charge in his gun was found to contain the same mixture.² A druggist's apprentice was tried for the murder, by prussic acid, of a female servant who was pregnant by him, and the case was one of much suspicion; but there was a strong counter-presumption, from the fact that the deceased had made preparations for a miscarriage on the very night in question.³ In a prosecution for murder where it.

¹ *Reg. v. Courtneage and Mossingham*, coram Mr. Serjeant ATCHERLEY, Winchester Spring Ass., 1843.

² *Reg. v. Whittle*, Liverpool Spring Assizes, 1839, coram Mr. Baron ALDERSON.

³ *Reg. v. Freeman*, Leicester Spring Assizes, 1839, coram BEST, L. C. J. And see *Rex v. Barnard*, 19 St. Tr. 815.

appeared that the mortal wound had been inflicted by an axe which was found in the snow with no tracks leading to it, and that it could have been thrown from a path near the house where the murder was done, and there was evidence that respondent could not have thrown it so far, it was held error to refuse an instruction that if the axe was thrown such a distance as to satisfy the jury that the defendant could not have thrown it, then the jury should be satisfied that she was not guilty. In the language of the court, "every circumstance developed on the trial showed that the person who committed the crime actually did throw the axe. It was shown no other could have thrown it away; and if the jury were satisfied that the respondent could not have thrown it where it was found, they were bound to acquit. It was something more than a strong circumstance. It was conclusive proof by the facts developed upon the trial, that the respondent could not have been guilty of the offence if she could not have thrown the axe where it was found."¹

Nor must it be overlooked, as one of the sources of error and fallacy in these cases, that circumstances of adverse presumption, apparently the most conclusive, have been fabricated by the real offender, in order to preclude suspicion from attaching to himself, and to cause it to rest upon another; as where a party was convicted upon an indictment for privily conveying three ducats into the prosecutor's pockets, with intent to charge him with having robbed him of the same;² or where an offender surreptitiously put on the shoes of another person while engaged in the commission of crime, in order that the impressions might lead to the inference that the crime was committed by him;³ or where the guilty person not only wore the shoes but also used, in committing the crime, the gun of one who was known to be at enmity with the deceased.

¹ *People v. Peterson*, 98 Mich. 27.

² *Rex v. Simon*, 19 St. Tr. 680; but upon a new trial the defendant was acquitted.

³ See the case of *Mayenc, Gabriel*, *ut supra*, 408. And see other such cases in Wharton's *Crim. Law*, and in the *Theory of Presumptive Proof*, App.; but Mr. Justice PARK, in *Rex v. Thurtell*, Hertford Winter Assizes, 1824, said that the latter were of no authority, and possibly mere romance.

CHAPTER VIII.

EVIDENCE OF CHARACTER.

IN forming a judgment of criminal intention, evidence that the party had previously borne a good character is often highly important.¹ In doubtful cases, especially, good character is generally entitled to great consideration.² Where the evidence is wholly circumstantial,³ and the testimony for and against the accused is nearly balanced, the weight of a good character ought to exert a potent influence in his favor.⁴ But on a trial for murder an instruction that proof of the defendant's good character for peace "may be sufficient to generate a reasonable doubt of his guilt, although no such doubt would

¹ *Coffee v. State*, 1 Tex. App. 548.

² *Riley's Case*, 1 City Hall Rec. 23; *People v. Paolick*, 7 N. Y. Cr. R. 30; *People v. Kirby*, 1 Wheel. Cr. Cas. 64.

³ But an instruction that only in cases of circumstantial evidence, or where the witnesses for the prosecution are of doubtful credit, is proof of the good character of the defendant proper to rebut any presumption of guilt, is defective and improper. *State v. Kinley*, 43 Iowa, 294; *State v. Rodman*, 62 Iowa, 456; *State v. Beebe*, 17 Minn. 241.

⁴ *Kistler v. State*, 54 Ind. 400; *McQueen v. State*, 82 Ind. 72; *Green v. Cornwell*, 1 City Hall Rec. 11. If the case hangs in even balance, evidence of previous good character should make it preponderate in defendant's favor. Per Lord ELLENBOROUGH in *Rex v. Davison*, 31 St. Tr. 217; *State v. Manluff*, 1 Houst. Crim. R. 209. And see the language of L. C. J. TINDALL, in *Reg. v. Frost*, Gurney's Rep. 749. But an instruction is too broad in which the jury are told that evidence of good character is proper in all criminal cases, and in doubtful cases frequently becomes material, and is sufficient to turn the scale in favor of the accused; and should they be in doubt as to the facts or guilt of the defendant as charged, they may give evidence of previous good character such weight as will turn the scale in his favor and find him not guilty. *State v. McGinnis*, 6 Nev. 109.

An instruction declaring that in all doubtful cases of guilt general good character is to be regarded as a strong circumstance in favor of the accused is technically wrong. The word "strong" should be omitted. *Schaller v. State*, 14 Mo. 502.

have existed but for such good character," gives undue prominence to proof of character.¹

But the benefit of a good character is not restricted to minor offences, nor to cases where a doubt of the defendant's guilt may exist.² If there is a reasonable doubt of guilt, the defendant is entitled to an acquittal whether his character is good or bad.³ This evidence is entitled to be considered in all criminal cases, where the crime charged is atrocious and where the evidence tends strongly to establish the guilt of the accused.⁴ If, however, the evidence of guilt be complete and

¹ *Scott v. State* (Ala.), 16 So. 925. See also *Paul v. State* (Ala.), 14 So. 634; *Goldsmith v. State* (Ala.), 16 So. 933. And the jury ought not to be told that if they find that the accused's former life was such that the crime charged would not reasonably and naturally find place in it, they may permit such conclusion to raise a reasonable doubt of his guilt, although the evidence satisfies them that he committed the crime charged. *Langford v. State*, 38 Fla. 233.

² *People v. Lee*, 72 Cal. 623; *State v. Barth*, 25 S. C. 175; 60 Am. Rep. 496; *United States v. Roudenbush*, 1 Baldw. 514; *United States v. Gunnell*, 5 Mackey, 196; *State v. Edwards*, 18 S. C. 30; *Stewart v. State*, 22 Ohio St. 477; *State v. Henry*, 50 N. C. 65; *State v. O'Connor*, 31 Mo. 389; *Baker v. State*, 53 N. J. L. 45; *People v. Hancock*, 7 Utah, 170; *Long v. State*, 23 Neb. 33; *Felix v. State*, 18 Ala. 720; *Hall v. State*, 40 Ala. 698; *People v. Ashe*, 44 Cal. 238.

³ *Holland v. State*, 131 Ind. 568.

⁴ *Parrish v. Com.*, 82 Va. 1; *Jupitty v. People*, 34 Ill. 516; *Remsen v. People*, 43 N. Y. 9; *People v. Stott*, 4 N. Y. Cr. R. 306; *State v. Horning*, 49 Iowa, 158; *State v. Northrup*, 48 Iowa, 583; 30 Am. Rep. 408; *State v. Gustafson*, 50 Iowa, 194; *State v. Lindley*, 51 Iowa, 343; 33 Am. Rep. 139. Evidence of good character of the accused may be shown in misdemeanors. *Rex v. Harris*, 32 Car. II., cited in *McNally*, Ev. *320; *Rex v. Keogh* (1798), cited in *McNally*, Ev. *320; *Rex v. Brown* (1798), cited in *McNally*, Ev. *320.

SHAW, C. J., said in *Webster's Case*, that "Where it is a question of great and atrocious criminality, the commission of the act is so unusual, so out of the ordinary course of things, and beyond common experience; it is so manifest that the offence, if perpetrated, must have been influenced by motives not frequently operating on the human mind; that evidence of character, and of a man's habitual conduct under common circumstances, must be considered far inferior to what it is in the accusations of a lower grade." These remarks were referred to and disapproved in a New York case, where it was said that *Webster's Case* was a peculiar one. *Cancemi v. People*, 16 N. Y.

They were quoted again by the court in the trial of *McLain v. Com.*, 99 Pa. St. 86, with the following additional remarks: "Evidence of good character, when proven to exist, is not a mere make-weight thrown in to assist in the production of a result that would happen at all events, but it is positive evidence. A case may be so made out that no previous character, however good, can make it doubtful; but there may be cases in

convincing, testimony of previous good character cannot and ought not to avail.¹ The reasonable operation of such evidence is to create a presumption that the party was not likely to have committed the act imputed to him;² which presumption, however weighty in a doubtful case, cannot but be irrelevant and unavailing against evidence which irrefragably establishes the fact. But it has been held that instructions regarding evidence as to character, to the effect that it was not to be allowed to weigh against evidence in itself satisfactory, are calculated to mislead. "Good character," said Chief Justice Cooley, "is an important fact with every man; and never more so than when he is put on trial charged with an offence which is rendered improbable in the last degree by a uniform course of life wholly inconsistent with any such crime. There are cases when it becomes a man's sole defence, and yet may prove sufficient to outweigh evidence of the most positive character. The most clear and convincing cases are sometimes rebutted by it, and a life of unblemished integrity becomes a complete shield of protection against the most skilful web of suspicion and falsehood which conspirators have been able to weave. Good character may not only raise a doubt of guilt which would not otherwise exist, but it may bring conviction of innocence. In every criminal trial it is a fact which the defendant is at liberty to put in evidence; and being in, the jury have a right to give it such a weight as they think it entitled to."³

which evidence given against a person without character would amount to certainty, in which a high character would produce a reasonable doubt, or, indeed, actually outweigh evidence which might otherwise appear conclusive."

¹ *Rex v. Haigh*, 31 St. Tr. 1122; *Riley's Case*, 1 City Hall Rec. 23; *People v. Haggerty*, 1 City Hall Rec. 65; *Freeland's Case*, 1 City Hall Rec. 82; *Hogan v. State*, 36 Wis. 226; *U. S. v. Means*, 43 Fed. Rep. 599; *U. S. v. Freeman*, 4 Mason, 505; *U. S. v. Newton*, 52 Fed. Rep. 275; *People v. Kirby*, 1 Wheel. Crim. Cas. 64; *United States v. Johnson*, 26 Fed. Rep. 682; *Coxwell v. State*, 66 Ga. 309; *United States v. Smith*, 2 Bond, 323; *Bernhardt v. State*, 82 Wis. 23; *State v. Wells*, 1 N. J. L. 424; 1 Am. Dec. 211; *Com. v. Robinson*, Thacher Crim. Cas. 230; *Com. v. Hardy*, 2 Mass. 317. Where the defendant admits the elements that constitute the crime, evidence of good character is of no avail. *U. S. v. Brontin*, 10 Fed. Rep. 730; *U. S. v. Allen*, 10 Biss. 90. And the fact that in such a case the State gave in proof the bad character of the accused before the accused had initiated the inquiry by evidence of good character, is an unimportant error. *Hartless v. State*, 32 Tex. 88.

² *State v. Ormiston*, 66 Ia. 143.

³ *People v. Garbutt*, 17 Mich. 9.

In no case should the court instruct that evidence of good character is of no avail. No matter how conclusive the other testimony may appear to be, the character of the accused may be such as to create a doubt in the minds of the jury, and lead them to believe in view of the improbabilities that a person of such character could be guilty of the offence charged, that the other evidence in the case is false or the witnesses mistaken.¹ Where the jury have been charged that in a doubtful case where the evidence hangs even, proof of good character would turn the scale, a further charge that if the crime had been conclusively proven to the satisfaction of the jury beyond a reasonable doubt, in that case any good character of the defendant does not avail him, does not remove from the consideration of the jury the evidence of good character upon the question of the guilt of the defendant.²

When the law says that good character alone may be able to generate a doubt, it does not mean that it may be considered independently of the other evidence in the case, but in connection with it.³ Upon the question of guilt or innocence, the jury should consider all the evidence, including that in relation to character,⁴ and if therefrom they believe the accused guilty

¹ *Kistler v. State*, 54 Ind. 400; *State v. Sauer*, 88 Minn. 438; *Remsen v. People*, 43 N. Y. 6; *Maclin v. State*, 44 Ark. 115. Mass. Gen. Stat., chap. 115, § 5, provides that the courts shall not charge juries with respect to matters of fact. *Com. v. Leonard*, 140 Mass. 473; 54 Am. Rep. 485.

² *People v. Sweeney*, 133 N. Y. 609, aff'g 36 N. Y. S. R. 75.

³ *Pate v. State*, 94 Ala. 14; *People v. Laird* (Mich.), 60 N. W. 457.

It is erroneous to instruct that the defendant may put his good reputation before the jury as a "kind of make-weight in his favor, if there is a pinch in the case." *State v. Daley*, 53 Vt. 442; 88 Am. Rep. 694.

⁴ *Pharr v. State*, 9 Tex. App. 129; *Holland v. State*, 81 N. E. 359; *Johnson v. State* (Ala.), 16 So. 29; *McQueen v. State*, 82 Ind. 72; *State v. McNally*, 87 Mo. 644; *Lee v. State*, 2 Tex. App. 339; *State v. Alexander*, 66 Mo. 148; *Territory v. Kleen* 1 Wash. Terr. 188; *Reg. v. Whiting*, 7 Car. & P. 771; *Rex v. Stannard*, 7 Car. & P. 673; *Williams v. State*, 52 Ala. 411; *Felix v. State*, 18 Ala. 720; *Hall v. State*, 40 Ala. 698; *People v. Bowman*, 81 Cal. 566; *People v. Doggett*, 62 Cal. 27; *People v. Bell*, 49 Cal. 486; *Carson v. State*, 50 Ala. 134; *Fields v. State*, 47 Ala. 608; 11 Am. Rep. 771; *State v. Howell*, 100 Mo. 628; *Shropshire v. State*, 81 Ga. 589; *Com. v. Carey*, 2 Brewst. 404; *People v. Wileman*, 44 Hun, 187; *Stephens v. People*, 4 Park. Crim. Rep. 396; *People v. Spriggs*, 33 N. Y. S. R. 989; *Stover v. People*, 56 N. Y. 315; *Remsen v. People*, 48 N. Y. 6, reversing 57 Barb. 324; *People v. Clements*, 42 Hun, 353; *People v. Moett*, 23 Hun, 60; *People v. Lamb*, 2 Keyes, 360; *United States v. Jones*, 31 Fed. Rep. 718; *Heine v. Com.*, 91 Pa. 145; *Hanney v. Com.*, 116 Pa. 323; *Com. v. Cleary*, 135 Pa. 64; 8 L. R. A. 301; *Johnson v. State*, 94 Ala. 35.

beyond a reasonable doubt, previous good character should not authorize an acquittal.¹

The value of proof of good character must always depend upon the circumstances of each particular case.² The evidence must be applicable to the nature of the charge preferred against the accused.³ The inquiry is generally limited to that trait of character which has some relevancy to the question in issue, and which may be supposed to render, to some extent, the commission of the crime charged improbable.⁴

"What you want to get at," said Cockburn, C. J., in a leading English case, "is the tendency and disposition of the man's mind toward committing or abstaining from committing the class of crime with which he stands charged."⁵

To prove, for instance, that a party has borne a good character for humanity and kindness, can have no bearing in reference to a charge of dishonesty.⁶

And in a late case it has been held that an accused charged

¹ *State v. Slingerland*, 19 Nev. 135, disapproving *People v. Gleason*, 1 Nev. 176, and *Levigne's Case*, 17 Nev. 445, where the jury was charged, in effect, that good character could not be considered unless, from the other evidence, the jury had a reasonable doubt of the defendant's guilt. See also, as sustaining the proposition of the text, *People v. Brooks*, 131 N. Y. 321; *People v. Kerr*, 6 N. Y. Supp. 674; *People v. Smith*, 59 Cal. 601; *Hirschman v. People*, 101 Ill. 568; *State v. Kilgore*, 70 Mo. 546; *State v. McMurphy*, 52 Mo. 251; *Freeland's Case*, 1 City Hall Rec. 82; *Hathcock v. State*, 88 Ga. 91; *Armor v. State*, 63 Ala. 173; *Becker v. Com. (Pa.)*, May 9, 1887; *Lowenberg v. People*, 5 Park. Crim. Rep. 414; *State v. Leppere*, 66 Wis. 355; *U. S. v. Jackson*, 29 Fed. Rep. 503; *Coleman v. State*, 59 Miss. 484; *State v. Douglass*, 44 Kan. 618; *State v. Sortor*, 52 Kan. 531.

The evidence of good character is to be considered in connection with the rest of the evidence as a part of the whole, and it is for the jury alone to determine whether it creates a reasonable doubt as to the defendant's guilt. *Bacon v. State*, 22 Fla. 51; *State v. Donovan*, 61 Ia. 278.

An instruction that, where the defendant had established a good character in a doubtful case, the law presumed he would not commit the crime, was properly refused, where the jury were told that they might consider good character with all the other facts. *State v. Underwood*, 76 Mo. 630.

It is error to instruct that "good character is a circumstance of great weight in doubtful cases, and of less weight in less doubtful cases." *Johnson v. State*, 84 Neb. 257.

² *Wagner v. State*, 107 Ind. 71.

³ *State v. Emery*, 59 Vt. 84.

⁴ *Fletcher v. State*, 49 Ind. 124; *State v. Bloom*, 68 Ind. 54; *Kee v. State*, 28 Ark. 155; *State v. Dalton*, 27 Mo. 12; *People v. Josephs*, 7 Cal. 129.

⁵ *R. v. Rowton*, L. & C. 520.

⁶ *Morgan v. State*, 88 Ala. 228; *People v. Cowgill*, 93 Cal. 596; *State v. Bloom*, 68 Ind. 54; *Walker v. State*, 102 Ind. 502.

with murder could not show that he was of a cowardly nature.¹

A defendant charged with the breach of a city by-law in driving faster than a walk cannot prove that he is a careful driver.²

And it is not competent to show, on a trial for adultery, that the defendant is "foolishly fond of women."³ And on a trial for murder it is not relevant that the defendant has been guilty of burglary at another time.⁴

But when the charge is that of pilfering and stealing, evidence of a high character for honesty ought to satisfy a jury that the accused is not likely to yield to so slight a temptation, unless the evidence of guilt is so clear and overwhelming as to leave no doubt.⁵ And it has been held that on a prosecution for carrying a pistol, where the intent is a necessary element of the offence under the statute, the defendant may show his general character for peace and quiet.⁶ Or on a charge of assault with intent to kill;⁷ or on an indictment for rape.⁸

And very recently it was held that evidence of the general reputation of the accused for peace and quietude is permissible in a prosecution for murder, though the murder may have been by poison.⁹

Negative testimony may be introduced in support of the defendant's good character.¹⁰ That the witness has never heard anything against the defendant's character is often more satisfactory than evidence of a positive character. A witness may not testify as to the character of the defendant from what he knows by personal acquaintance merely, and where he knows nothing of the reputation borne by the defendant in the neighborhood in which he lives, and where he is not in such a position with

¹ *Walker v. State*, 28 Tex. App. 503.

² *Com. v. Worcester*, 3 Pick. 462.

³ *Cauley v. State*, 92 Ala. 71.

⁴ *People v. Greenwall*, 108 N. Y. 296.

⁵ *Covender v. State*, 126 Ind. 47; *State v. Bloom*, 68 Ind. 54; *People v. Velarde*, 59 Cal. 457.

⁶ *Lann v. State*, 25 Tex. App. 495.

⁷ *State v. Schlegel*, 50 Kan. 325.

⁸ *Hardtke v. State*, 67 Wis. 552; *Lincecum v. State*, 29 Tex. App. 323.

⁹ *Hall v. State*, 132 Ind. 317. See Whart. Cr. Ev. (9th Ed.) § 60. *Carroll v. State*, 3 Humph. 315, was an indictment for murder, and the State was permitted to prove that the deceased was of a mild and pacific temper, to aid the jury in ascertaining the probable grade of the offence.

¹⁰ *Hussey v. State*, 87 Ala. 121; *Gandolfo v. State*, 11 Ohio St. 114; *State v. Lee*, 22 Minn. 407; 21 Am. Rep. 769.

reference to the defendant's residence or circle of acquaintances as that the fact of his not hearing anything against him would have any tendency to show that nothing had been said, and that therefore his character was good.¹

Character can be proved only by general reputation.² One's reputation consists in the general estimation in which he is held by his neighbors. This is to be ascertained by what they generally say of him. When the witness is allowed to state his personal opinion of the defendant it is as a matter of favor.³

Character may not be established by introducing evidence of particular acts.⁴

The correct mode of inquiry is, as to the *general* character of the accused, and whether the witness thinks him likely to be guilty of the offence which is charged against him.⁵ It is not permitted to adduce evidence that the prisoner has not borne a good character, an inquiry which is really irrelevant, and calculated to divert attention from a true point to a collateral one, since even if his general character were clearly shown to be bad, he may not have committed the act in question.⁶ For example, general evidence that a defendant is a bad man is not admissible on a trial for forgery.⁷ And on a trial for the murder of a slave the State was not allowed to prove the general habit of the accused in his capacity as overseer in punishing slaves.⁸

¹ *Holmes v. State*, 88 Ala. 26. *Contra*, *State v. Sterrett*, 68 Ia. 76.

² *Thompson v. State* (Ala.), 14 So. 878; *Berneker v. State*, 40 Neb. 810.

³ *State v. Emery*, 59 Vt. 84; *Com. v. Mullen*, 150 Mass. 894; *Jones v. State*, 76 Ala. 8; *Com. v. Twitchell*, 1 Brewst. 563; *State v. Pearce*, 15 Nev. 188; *State v. Nelson*, 118 Mo. 124; *Rex v. Jones*, 81 St. Tr. 310.

⁴ *Jones v. State*, 76 Ala. 8.

⁵ Per Lord ELLENBOROUGH, in *Rex v. Davison*, 81 St. Tr. 187; *Jones v. State*, 10 Tex. App. 552; *State v. Dalton*, 27 Mo. 12; *State v. King*, 78 Mo. 558.

⁶ *State v. Creson*, 88 Mo. 872; *Carter v. State*, 36 Neb. ; *Petty v. Com.*, 12 Ky. L. Rep. 919; *Harrison v. State*, 37 Ala. 154; *State v. Merrill*, 13 N. C. 269; *State v. Rainsbarger*, 71 Iowa, 746; *Young v. Com.*, 6 Bush, 312; *State v. Donohoo*, 22 W. Va. 761; *Redman v. State*, 1 Blackf. 967; *Linton v. State*, 88 Ala. 216; *Letty v. State* (Tex. Crim. App.), Feb. 25, 1893.

⁷ *Pauli v. Com.*, 89 Pa. 432.

⁸ *Dowling v. State*, 5 Sm. & M. 664. But in *State v. Summers*, 98 N. C. 702, a conviction for adultery, the Supreme Court says; "Before judgment, a number of witnesses of high character testified that the defendant was a man of bad character; his moral character being especially bad. It was

This principle has been carried so far that, on an indictment for a particular offence, evidence of an admission by the accused that he was addicted to the commission of that offence was rejected as irrelevant.¹ And where the defendant is indicted for rioting, his connection with former riots may not be shown.² But in Maryland it is provided by statute that, where the defendant is charged with being a common thief, evidence of facts or reputation showing that he is habitually and by practice a thief, shall be sufficient for conviction.³

In the text-books of the Civil Law, much stress is laid upon the *mala fama*, and in Scotland habit and repute is an admitted aggravation in charges of theft,⁴ but there are not wanting exemplifications of the danger of permitting the influence of such evidence.

If, however, the presumption arising from the evidence of previous good character be set up by the prisoner, it is then competent to neutralize its effect by the cross-examination of his witnesses. When a witness testifies that the defendant's reputation is good with respect to some quality or disposition, it is competent to show by his cross-examination that he has heard reports at variance with the reputation he has given the party. And if his admissions of hearing such adverse rumors go to the extent of showing that they were general in the neighborhood where the party resided, the effect of the witness's testimony in chief would be destroyed.⁵

The witness having testified to a knowledge of the character of the accused, and that it is good, it is proper by cross-examination to develop the extent of his knowledge of his character and the facts upon which his opinion is based. That the jury may properly weigh his estimate of character, it is right that they be fully informed of the facts within the knowledge of the witness which led him to the formation of that estimate.⁶ The extent to which the cross-examination may be carried rests largely in the discretion of the trial court. A witness was asked if he had not heard that the accused had been previously competent for his honor to have such evidence as he might deem necessary and proper to aid his judgment and discretion in determining the punishment to be imposed."

² *State v. Renton*, 15 N. H. 169.

¹ *Rex v. Cole*, Best on Pres. p. 212.

³ Md. Acts, 1864, c. 38.

⁴ 1 Dickson's L. of Ev. *ut supra*, 22.

⁵ *McDonel v. State*, 18 Cent. L. J. 374.

⁶ *Reg. v. Hodgkiss*, 7 C. & P. 298.

arrested on a charge of malicious trespass, and on another occasion for shooting a turnkey.¹

In a case in Alabama the witness testified that he had never heard anything against the defendant. He was asked on cross-examination if he had not heard that the defendant "wore stripes" while working on the streets.² In a defence to rape, where testimony of the general good character of the accused was introduced, the State was allowed to ask, upon cross-examination, whether a certain lewd woman had not lived for some time in his family.³ And on a trial for murder, the prosecution was allowed to ask, in cross-examining a witness who testified to the good character of the accused, if the witness had heard that the accused had shot some one else.⁴

In a recent case in Alabama this question was thoroughly discussed; and we cannot do better than quote the summary of the law given by McClellan, J., in his exhaustive opinion. "Opinions, rumors, and reports," said the learned judge, "concerning the conduct or particular acts of the party under inquiry, are the source from which in most instances the witness derives whatever knowledge he may have on the subject of general reputation; and as a test of his information, accuracy, and credibility, but not for the purpose of proving particular acts or facts, he may always be asked on cross-examination, as to the opinions he has heard expressed by members of the community, and even by himself as one of them, touching the character of the defendant or deceased, as the case may be, and whether he has not heard one or more persons of the neighborhood impute particular acts or the commission of particular crimes to the party under investigation, or reports and rumors to that effect. But it is not proper even on cross-examination to elicit the witness's knowledge of the conduct or of particular acts of a defendant or other person, whose character is involved in the issue."⁵

But facts must be asked about and not mere accusations,

¹ *Randall v. State*, 132 Ind. 539.

² *Holmes v. State*, 88 Ala. 26. See also *D'Arwan v. State*, 71 Ala. 352; *State v. Merriman*, 84 S. C. 576.

³ *State v. Jerome*, 83 Conn. 285.

⁴ *Ogburn v. State*, 87 Ga. 173.

⁵ *Moulton v. State*, 88 Ala. 116; 6 L. R. A. 801. See also *State v. Bulard*, 100 N. C. 436; *State v. Austin*, 108 N. C. 780; *Engleman v. State*, 2 Ind. 91; *Gordon v. State*, 3 Ia. 410; *Garrett v. State*, 97 Ala. 18; *Patterson v. State*, 41 Neb. 538.

whose truth is not presumed, and which therefore do not tend to impair the moral character.¹ An indictment is a severe accusation.²

Where the defendant offers himself as a witness he is subject to cross-examination ;³ and no modification of the rules of cross-examination will be made as to him.⁴ A witness was asked whether he had not been guilty some time before of an assault on a person named.⁵ In another case the defendant was asked whether he had not been suspended from practising as an attorney.⁶ On an indictment for selling lottery tickets the defendant was asked on cross-examination whether he had been convicted of sending lottery papers through the mail.⁷ For the purpose of discrediting witnesses testifying to the good character of the accused, they may be cross-examined as to the grounds of their belief.⁸ But it is not competent to repel such evidence by calling witnesses to give evidence of the prisoner's general bad character.⁹ Thus where a prisoner was indicted for a highway robbery, and called a witness who deposed to having known him for years, during which time he had borne a good character, it was permitted to ask the witness on cross-examination whether he had not heard that the prisoner was *suspected* of having committed a robbery which had taken place in the neighborhood some years before; Mr. Baron Parke said, that "the question is not whether the prisoner was *guilty* of that robbery, but whether he was *suspected* of having been implicated in it. A man's character," added the learned judge, "is made up of a number of small circum-

¹ *People v. Crapo*, 76 N. Y. 288.

² *Ryan v. People*, 79 N. Y. 594.

³ And in Massachusetts this is not confined to the matters inquired of in chief. *Com. v. Morgan*, 107 Mass. 199.

⁴ *Spies v. People*, 122 Ill. 1; *People v. McGungill*, 41 Cal. 423; *State v. Reagan*, 5 Mo. App. 592; *People v. Fong Ching*, 78 Cal. 169; *Connors v. People*, 50 N. Y. 240; *Norfolk v. Gaylord*, 28 Conn. 309.

On trial for an illegal sale of liquors, the defendant offered himself as a witness in his own behalf, and then, on cross-examination, refused to answer a question relating to the sale. It was held that it was proper for the State's counsel to comment on this. *State v. Ober*, 52 N. H. 459.

⁵ *People v. Irving*, 2 N. Y. Cr. R. 171.

⁶ *People v. Reaney*, 4 N. Y. Cr. R. 1.

⁷ *People v. Noelke*, 1 N. Y. Cr. R. 495.

⁸ *Taylor's L. of Ev.* 810.

⁹ *Reg. v. Burt and others*, 5 Cox's C. C. 284. And rebuttal evidence showing the local reputation of the defendant in the neighborhood remote from the party's residence, as to particular facts, is not admissible. *Griffin v. State*, 14 Ohio St. 55.

stances, of which his being suspected of misconduct is one ;”¹ but Mr. Justice Erle refused to permit the cross-examination of a witness to character as to circumstances of suspicion against the prisoner which occurred upon the same day as the alleged offence was committed.²

And it is generally held that character may not be rebutted by evidence of conduct or particular acts.³ The prisoner was tried upon an indictment for having counterfeited money in his possession, and a new trial was granted because the prosecutor had been allowed to prove that the prisoner had been in prison in another State.⁴

And where the defendant is charged with murder, the State may not introduce evidence tending to prove that he had previously been involved in personal difficulties, and that he had on one occasion threatened to shoot a person.⁵ And an act of violence by the prisoner against another than the deceased at a time before the difficulty and at a different place may not be shown.⁶

An exception to the rule has been created in England by statute 6 and 7 William IV. c. 111, which enacts that, if upon the trial of any person for any subsequent felony, such person shall give evidence of his good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the conviction of such prisoner for the previous felony, and that the jury shall inquire of the previous conviction and subsequent offence at the same time. This provision was extended by St. 14 & 15 Vict. c. 19, s. 9, to many misdemeanors. In a case tried while both these statutes were still in force, it was held that the statutes equally applied where the evidence of good character was obtained by the prisoner's counsel on the cross-examination of the witnesses for the prosecution.⁷ But this latter statute was repealed by St. 24 & 25 Vict. c. 95.

The defendant may not give evidence relating to his char-

¹ *Rex v. Wood*, 5 Jurist, 225 ; Best on Pres. 215.

² *Reg. v. Rogan & Elliott*, 1 Cox's C. C. 291.

³ *McCarty v. People*, 51 Ill. 231 ; *Reddick v. State*, 25 Fla. 112 ; *Dupree v. State*, 33 Ala. 380 ; 73 Am. Dec. 422 ; *Rex v. Rowton*, 34 L. J. M. C. 57 ; 1 Leigh & C. 520 ; *State v. Laxton*, 76 N. C. 216 ; *Simpson v. State*, 1 Ala. L. J. 239, cited in 3 Crim. L. Mag. 880 ; *Com v. O'Brien*, 119 Mass. 842 ; 20 Am. Rep. 325 ; *Morgan v. State*, 88 Ala. 223.

⁴ *People v. White*, 14 Wend. 111.

⁵ *State v. Sterrett*, 71 Ia. 386.

⁶ *Brownell v. People*, 88 Mich. 732.

⁷ *Reg. v. Shrimpton*, 3 C. & K. 373.

acter at a time later than the offence with which he is charged.¹ And one who has learned since the offence what the defendant's character was prior thereto may not testify.² And the State in its rebuttal evidence should be restricted to the time of the alleged offence, and not be allowed to show the character of the accused at the time of the trial.³

There have been cases which have held that, where the evidence is circumstantial, and no evidence of character is produced, the probability of guilt is stronger than if a good character had been shown.⁴ But a different ruling has been made in late cases in the highest courts of the same States, and it may be said to be the law that the failure of the defendant to call witnesses to prove his general good character raises no presumption against it.⁵

And it is an error of the gravest character to allow the counsel for the prosecution to refer to such omission.⁶

But an instruction saying that "the character of every defendant in a criminal case is conclusively presumed to be good" is too strong.⁷ In the absence of proof on the subject, it has been recently said, the jury are not authorized to assume that character is either good or bad and allow the assumption to affect their judgment.⁸

¹ *State v. Johnson*, 1 Winst. 151; *Graham v. State*, 29 Tex. App. 31; *White v. Com.*, 80 Ky. 480. An objection to the form of the question, "Are you acquainted with defendant's reputation as a peaceable, law-abiding citizen?" was properly sustained, as the question was not explicit enough as to time and place. *State v. Ward*, 73 Iowa, 532.

² *Griffith v. State*, 90 Ala. 538.

³ *State v. Johnson*, 60 N. C. 152; *Wool v. State*, 20 Ohio St. 460; *Brown v. State*, 46 Ala. 175. The contrary was held in a Massachusetts case, but it was there said that such evidence ought to be received with caution. *Com. v. Sackett*, 23 Pick. 394. The character of the defendant subsequent to the charge may become important on the question of his credibility as a witness. *Lea v. State (Tenn.)*, 29 S. W. 900.

⁴ *People v. Vane*, 12 Wend. 78; *People v. Gardner*, 1 Wheel. 23. And see *People v. White*, 24 Wend. 520; *State v. McAllister*, 24 Me. 139; *State v. Tozier*, 49 Me. 404.

⁵ *Ormsby v. People*, 53 N. Y. 472; *Donoghoe v. People*, 6 Park. Cr. R. 120; *People v. Bodine*, 1 Denio, 281; *Ackley v. People*, 9 Barb. 609; *State v. Kabrich*, 39 Ia. 277; *State v. Dockstader*, 42 Ia. 436; *State v. Upham*, 38 Me. 261; *State v. Tozier*, 49 Me. 404.

⁶ *People v. Evans*, 72 Mich. 367; *Chick v. State*, 40 Ind. 263; *State v. O'Neal*, 29 N. C. 251; *Bennett v. State*, 86 Ga. 401.

⁷ *State v. Smith*, 50 Kan. 69.

⁸ *Dryman v. State*, 102 Ala. 130.

CHAPTER IX.

THE DEFENCE OF ALIBI.

EVIDENCE of the absence of defendant from the place of the crime at the time thereof is admitted to establish a defense.¹ And of all kinds of exculpatory evidence, that of an *alibi*, if clearly established by unsuspected testimony, is the most satisfactory and conclusive.² It is not accurate to say that the defence of *alibi* tends merely to cast a reasonable doubt upon the case made by the people.³ While the foregoing considerations are more or less of an argumentative and inconclusive character, this defence, if the element of time be definitely and conclusively fixed, and the accused be shown to have been at some other place at the time, is absolutely incompatible with, and exclusive of, the possibility of the truth of the charge. The jury should scan with care the testimony given in support of the defence of an *alibi*, but the defence is not to be regarded as a suspicious one. It is, on the contrary, as honorable, and, when clearly proved, as satisfactory, as any which the law permits.⁴ Evidence tending to prove any fact may sometimes be open to suspicion. But law is fixed and uniform. It cannot be one thing in one case and another thing in another case, as evidence may be. And there is no rule of law which attaches a suspicion to, or fixes a blemish upon, evidence tending to prove an *alibi*, any more than upon evidence tending to prove any other fact.⁵ It is, however, a defence so liable to abuse where a design exists to practise a fraud upon the State, and even when that design does not exist, by ignorant mistakes as to the particular hour and lapse of time, that it requires great strictness and caution on the part

¹ *People v. Wilson*, 85 Cal. 44.

² *Rea v. State*, 8 Lea, 356; *People v. Lee Gam*, 69 Cal. 552.

³ *Ackerson v. People*, 124 Ill. 563; *Sheehan v. People*, 131 Ill. 22.

⁴ *People v. Kelly*, 35 Hun, 295.

⁵ *Albin v. State*, 68 Ind. 598.

of the jury to avoid being misled by it.¹ "It must be admitted," says Sir Michael Foster, "that mere *alibi* evidence lieth under a great and general prejudice, and ought to be heard with uncommon caution; but if it appeareth to be founded in truth it is the best negative evidence that can be offered: it is really positive evidence, which in the nature of things necessarily implieth a negative; and in many cases it is the only evidence which an innocent man can offer."² A charge of assault with intent to commit rape is one easily made, hard to be proved, but still harder to be defended even by the innocent. But even in a case of this character the court did not err in instructing the jury that the defence of an *alibi* was one easily manufactured, and that the proof should be scanned with care.³ For when wholly false its detection may be a matter of very great difficulty.

It is the exclusive province of the jury to judge of the weight of the testimony introduced to establish this defence.⁴ And in some jurisdictions it is held that the defence of an *alibi*, like any other defence, should be left to the jury, uninfluenced by charges from the court calculated to disparage or excite prejudice against it.⁵

One case condemned an instruction which contained the comment that the defence is "often presented by guilty persons, as well as by innocent ones, and one in which perjury, mistake, and deception are often committed."⁶ And in another case the judgment of the trial court was reversed because the judge had said in his charge that "testimony offered to establish an *alibi* should be weighed with great caution in connection with all the evidence in the case, because it was a defence easily fabricated, and often attempted by contrivance or perjury," and this though, it was added, that when fully and satisfactorily established by the evidence to the satisfaction of the jury, it was a good and complete legal defence. For, it was said, the defendant is not required, in any phase of any criminal case, to prove his defence to the satisfaction of the jury, but only to raise a reasonable doubt.⁷ And where there was credible evi-

¹ *Rea v. State*, 8 Lea, 356; *People v. Lee Gam*, 69 Cal. 552.

² Foster's C. L., *ut supra*, 368. And see the observations of Mr. Baron GEORGE, in *Rex v. Brennan*, 30 St. Tr. 79.

³ *State v. Blunt*, 59 Ia. 648.

⁴ *State v. Chee Gong*, 16 Ore. 534..

⁵ *Simmons v. State*, 61 Miss. 243.

⁶ *State v. Chee Gong*, *supra*.

⁷ *Dawson v. State*, 62 Miss. 241.

dence in support of the defence of an *alibi* a charge susceptible of the construction that it was a circumstance to the defendant's prejudice if his witnesses perjured themselves to establish the *alibi*, was held erroneous.¹

It is obviously essential to the proof of an *alibi* that it should cover and account for the whole of the time of the transaction in question,² or, at least, for so much of it as to render it impossible that the prisoner could have committed the imputed act. The proof must preclude the possibility of the prisoner's presence at the time and place of the commission of the crime.³ It is not enough that it renders his guilt improbable merely, and if the time is not exactly fixed, and the place at which the accused is alleged by the defence to have been is not far off, the question then becomes one of probabilities. The court, therefore, in one case refused to direct an acquittal on the ground that the defendant was seen, about two hours before the commission of the crime, at some distance from the place thereof, when the distance did not appear.⁴

And in another case a defence of an *alibi* was disregarded, because all that the prisoners offered to prove was that they were in bed on the night in question at twelve o'clock, and were found in bed next morning, after the arson with which they were charged had taken place, the distance being two miles, so that they might have risen, committed the deed, and returned to bed.⁵ In a recent case it was attempted to prove an *alibi*, but it was only shown that several days before the murder the defendant was seen at a point 70 miles distant from the scene of the crime. This was clearly insufficient, especially in view of the fact that there was railway communication between the two points.⁶ On the trial of a man for the murder of a young woman under circumstances of the strongest adverse presumption, the proof was that the deceased had been murdered at her father's cottage in the forenoon of the day in question, and the prisoner alleged that he was at work the whole of that day with his fellow-laborers at a

¹ Prince v. State, 100 Ala. 144.

² Miller v. People, 89 Ill. 457; Aneals v. People, 184 Ill. 401; Wisdom v. People, 11 Colo. 170; Murphy v. State, 81 Fla. 166.

³ Briceland v. Com., 74 Pa. St. 463; Miller v. People, *supra*.

⁴ Burger v. State, 83 Ala. 86.

⁵ Rex v. Fraser, Alison's Princ. 625.

⁶ McGill v. State, 25 Tex. App. 499.

distance from the cottage ; but it turned out that he had been absent from his work about half an hour, an interval sufficiently long to have enabled him to reach the cottage, commit the murder, and rejoin his fellow-workmen. He was convicted, and before his execution confessed his guilt.¹

The credibility of an *alibi* is greatly strengthened if it be set up at the moment when the accusation is first made, and be consistently maintained throughout the subsequent proceedings.² These conditions were remarkably fulfilled in the memorable case of Abraham Thornton, of which a full account will be given hereafter. To all appearance the guilt of the prisoner was the necessary conclusion from the supposed inculpatory facts, and yet he had been seen by a number of independent and unimpeachable witnesses at such a distance from the scene of the alleged murder, at the very time when it must have been committed, if at all, as to render it physically impossible that the deceased could have been murdered by him ; and all the facts supposed to have been the conclusive indications of guilt were satisfactorily explained by collateral circumstances, and by a different hypothesis.³

On the other hand, the failure, unexplained, to assert this defence when it could first be made, and, if true, would be conclusive, is always a most suspicious circumstance ;⁴ or if nothing happened immediately after the transaction to lead the witnesses to watch so as to be accurate in the hour or time to which they speak, even supposing them to depose under no improper bias or influence ;⁵ or if having been once resorted to, a different and inconsistent defence is afterwards set up.

There are many other sources of fallacy connected with this particular defence ; such as the possible difference of clocks ;⁶ or the fraudulent alteration of them to tally with other facts ; as where one of the perpetrators of a murder hastened home, put back the clock two hours, and went to bed, and shortly

¹ *Rex v. Richardson, infra.*

² *Dean v. Com.*, 32 Grat. 912.

³ *Rex v. Thornton, infra.* And see *Rex v. Canning*, 19 St. Tr. 283, where the prosecutrix of a capital charge was convicted of perjury on the evidence of thirty-eight witnesses who proved an *alibi*.

⁴ *Dean v. Com.*, 32 Grat. 912.

⁵ Per Mr. Justice LE BLANC, in *Rex v. Mellor and others*, 81 St. Tr. 1032. And see *Rex v. Haigh*, Id. 1118 ; and the observations of SHAW, C. J., in *Webster's Case*, 5 Cush. 295.

⁶ *Rex v. Schofield*, 31 St. Tr. 1063 ; *Rex v. Mellor*, Id. 1027.

afterwards awoke his servant, and told her to go downstairs and see what was the time, which she did, not knowing that the clock had been tampered with; so that her testimony led to his acquittal.¹ Very often, too, without doubt, a mistake is made as to the person from want of an opportunity of accurate observation, or other causes of misconception. In a recent case, a trial for uttering and publishing a forged note, the defence was an *alibi*. The person on whom the note was passed, one D., identified the defendant as the person who sold it to him; two witnesses testified that they saw defendant with D. on the date mentioned; and three other witnesses said that he was in the vicinity of the town where the note was passed on that day and for several days previous. But the defendant introduced fifteen witnesses who testified to the presence of defendant in a distant county on the day in question and for several days prior and subsequent to that date.²

A group of irrelevant facts is sometimes artfully arranged so as to give an appearance of reality and coherence to the defence, the facts being true in themselves, but fraudulently referred to the critical day or time, instead of to the real time of their occurrence;³ or such a misstatement may take place by unintentional mistake.⁴

In a celebrated case, where several persons were tried for an atrocious murder, it appears to have been a part of the plot for each of the prisoners to sleep on the night of the murder with some one who could testify to an *alibi*. One of the murderers had requested a man to sleep in his house; but the witness stated that he might have been absent while he was asleep. Another of them went several miles from the place of the murder to sleep, and the person in whose house he stayed had no doubt that he was within doors the whole night. Two others of them went to a tavern several miles from the scene of the murder, and went to bed together; but in the night one of them was discovered leaving the house, although he evidently wished to be unnoticed; and he was absent so long, not returning until the morning, as to alarm the tavern-

¹ *Rex v. Hardy*. See the "Times" newspaper of the 28th November, 1857, where it is stated that one of the murderers made a circumstantial confession on his death-bed.

² *State v. Beasley*, 50 N. W. 570.

³ See a case of this kind in 8 Lond. Med. Gaz. 36.

⁴ *Rex v. Baines*, 31 St. Tr. 1091; *Rex v. Haigh*, *ut supra*.

keeper, who with his wife made diligent search for him in the neighborhood, but his bed-fellow manifested no anxiety or alarm, and got up and assisted in the search.¹

This defence is especially easy of fabrication or mistake in regard to the essential element of time, where a few minutes may be of vital moment. Honest witnesses sometimes mistake dates and periods of time;² but the unblushing effrontery with which witnesses sometimes present themselves to speak to time, without regard to plausibility or consistency, is truly surprising. On a trial for murder, two witnesses who were called to support a defence of an *alibi*, swore that they were able to speak positively to the time, from having looked at a clock; but upon being required by the counsel for the prosecution to tell the time by the clock in court, after some hesitation they admitted that they were unable to do so.³

In another case it was elicited in cross-examination of a woman with whom the prisoner lived, that on his return home after an absence of an hour, during which he committed two murders, he told her to say that he had not been out more than ten minutes.⁴

It is a circumstance which will tell against the accused if pertinent and material evidence by which an *alibi* might, if true, have been supported, is withheld.⁵ A mere unsuccessful attempt to prove an *alibi* is not a circumstance of great weight against the prisoner.⁶ Failure in this proof should have no greater weight to convince a jury of the guilt of a prisoner attempting it than the failure to prove any other important item of defence. A prisoner is entitled to rely on the facts in his favor, that he may suppose he is able to prove, and if he is so unfortunate as to fail in his proof, it should not, generally speaking, operate to his prejudice.⁷ And an instruction in a criminal case that the prisoner has "attempted" to set up an *alibi* is erroneous, as tending to intimate to the jury that the effort to prove an *alibi* amounted to nothing more than an attempt.⁸ "Because susceptible of easy

¹ Case of Bauer *et al.*, 2 Chandl. Am. Cr. Tr. 356.

² People v. Wong Ah Foo, 69 Cal. 180.

³ Reg. v. Cane and others, C. C. C., 20th of June, 1851.

⁴ Reg. v. Rush, Norfolk Spr. Ass., 1849.

⁵ Rex v. Haigh and others, *ut supra*; Rex v. Hunter and others, Rep., *ut supra*, 365.

⁶ People v. Malaspina, 57 Cal. 628.

⁷ Miller v. People, 89 Ill. 457.

⁸ Miles v. State, 93 Ga. 117.

fabrication and often attempted to be sustained by perjury, whereby the accused endeavors to break the net-work of facts and circumstances surely bringing him to conviction and punishment, the proof of an *alibi* is, and should be, subjected to a careful scrutiny; but it is an error to assume that the law looks upon such attempt with suspicion. A general prejudice against such attempt has resulted from the unquestioned fact that an *alibi* is often forged, constituting an artifice or contrivance to shield the guilty. But being a defence which may be lawfully made, and which in legal contemplation is of the same form as other lawful defences, there can be no rule of law founded on logic or principle, common sense or justice, which recognizes a distinction between the consequent weight of an unsuccessful attempt to establish an *alibi*, and that of an unsuccessful attempt to prove any other material fact in defence."¹ Where the attempt to prove the *alibi* fails, the evidence offered in support of it may nevertheless be considered by the jury as otherwise affecting the case.²

But if the defence is resorted to fraudulently,³ or is detected to be the result of after-thought or contrivance, the attempt to set it up usually recoils with fatal effect upon the party who asserts it; and, in the language of Mr. Baron Daly, "amounts to a conviction."⁴ Where the defendant attempted to prove an *alibi*, but the circumstances pointed conclusively to the fact that he was at the scene of the crime when it was committed, the court said that the prisoner's denial was against him.⁵ An indictment for murder was tried five times. On each of the first four trials a witness, the brother-in-law of the defendant, gave testimony which established an *alibi*, but on the fifth trial this witness recanted his former statements and testified that on the evening of the homicide the defendant came to the house of the witness and confessed the murder. This evidence, together with the circumstances in the case, was held sufficient for conviction.⁶

"The truth of this sort of defence," said Mr. Baron George,⁷

¹ See opinion of the court in *Allbritton v. State*, 94 Ala. 76. See further on this point, *supra*. ² *Toler v. State*, 16 Ohio St. 588.

³ *State v. Collins*, 20 Ia. 85.

⁴ In *Rex v. Killan*, 20 St. Tr. 1085.

⁵ *Coleman v. State*, 26 Fla. 61. And see *Com. v. McMahon*, 145 Pa. 413; *State v. Dimmitt*, 88 Ia. 551; *People v. Johnson*, 140 N. Y. 350.

⁶ *Moody v. State*, 37 Tex. App. 287. ⁷ In *Rex v. Brennan*, 80 St. Tr. 79.

"is not always to be ascertained by the direct testimony of the witnesses called to prove it. Several witnesses are seldom produced in such cases without its being known that they agree with each other in the substantial and principal facts they are to relate ; and as in general it is not to be expected that a prosecutor should come with evidence prepared to meet this sort of defence, the usual test of its truth or of its falsehood, where they are unknown to the jury, is a cross-examination of the witnesses, kept asunder, and fairly conducted under the eye and observation of the jury ; and here differences or contradictions, otherwise trivial, become important in showing the truth or falsehood of such narrative." In such circumstances, if the story be a fabrication, it is obviously far more easy for the witnesses to agree on the more general fact of the prisoner's presence at the time and place referred to, than on the minute surrounding particulars.¹

The foregoing examples suffice to illustrate the subject of exculpatory presumptions ; but it is obvious that as inculpatory facts are infinitely diversified, exculpatory facts must admit of the same extent of variety, and that they may be of every degree of force. In all such cases of conflicting presumptions it is the duty of the jury, with the assistance of the court, to weigh and estimate the force of each several circumstance of presumption, and to act upon what appear to be the superior probabilities of the case ; and if there be not a decided preponderance of evidence to establish the guilt of the party, to take the safe and just course, by abstaining from pronouncing a verdict of guilty, where the necessary light and knowledge to justify them in so doing with the full assurance of moral certainty is unattainable.²

¹ Reg. v. Hunter, Rep., *ut supra*, 865. ² Mittermaier, *ut supra*, ch. 56.

PART IV.

RULES OF INDUCTION SPECIALLY TO BE OBSERVED IN CASES OF CIRCUMSTANTIAL EVIDENCE.

INTRODUCTORY REMARKS.

ALL reasoning concerning human conduct is essentially a process of induction, of which it is the object, by means of generalizations founded upon a knowledge of the faculties, emotions, and laws of the mind, to discover the moral qualities and causal origin of the voluntary actions of our fellow-men; whence it follows that the rules for the conduct of inductive inquiry belong formally to the province of *Logio*, or the science of the laws of thought. The rules of evidence are, therefore, a selection of maxims tacitly assumed and acted upon by all men in the ordinary affairs of life, and recognized by philosophical wisdom and judicial experience as the best means of discovering truth. The purpose of this essay requires the enumeration only of such few leading rules of evidence as are of special, though not of exclusive application, to the particular subject-matter of this treatise.¹

¹ Mittermaier, *ut supra*, c. 57.

CHAPTER I.

PROOF OF THE FACTS ALLEGED IS REQUISITE.

The facts alleged as the basis of any legal inference must be clearly proved, and indubitably connected with the factum probandum.

No conclusion is reliable which is drawn from premises that are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved and not themselves presumed.¹ A presumption which the jury is to draw is not a circumstance in proof, and is therefore not itself a legitimate foundation for a presumption. Let the principal fact be what it may, the facts relied upon must be proved in the strictest sense of the word.² No safe conclusion can be deduced from circumstantial evidence if it be left reasonable to suppose that the circumstances themselves are not proved. It may be a very significant circumstance that a footprint is found; but if the facts are such as to render it reasonable that there was no footprint, the circumstance that some crazy man had said so would be of no importance.³ The jury should not indulge in the supposition of facts not proven.⁴

This rule is an indispensable condition of all sound induction; and its object is, by proper rejections and exclusions, and after as many negations as are necessary,⁵ to verify facts and clear them from all ambiguity, so that they may become the premises of logical argument and reasoning. In moral investigations the facts are generally more obscurely developed than when physical phenomena form the subjects of inquiry; and they are

¹ Douglas v. Mitchell, 35 Pa. St. 440; Manning v. John Hancock Mut. L. Ins. Co., 100 U. S. 693.

² Jernigan v. State, 10 Tex. Crim. App. 546; Taylor v. State, 9 Id. 100; Ward v. State, 10 Id. 293.

³ Worth v. Norton, 33 Tex. 192.

⁴ Ray v. State, 50 Ala. 104; People v. Brannon, 47 Cal. 96; White v. State, 36 Tex. 347; Earle v. People, 73 Ill. 329; Walbridge v. State, 13 Neb. 236.

⁵ Nov. Org. lib. i.; Aphor. Ev. 2; Mill's Log. b. v. c. 2 & 3.

frequently blended with foreign and irrelevant circumstances, so that the establishment of their connection with the *factum probandum* becomes matter of considerable difficulty. No weight, therefore, must be attached to circumstances which, however they may excite conjecture, do not warrant belief.¹

In a case resting on circumstantial evidence, the party upon whom the burden of proof rests is bound to prove every fact *essential* to the conclusion of guilt in the same manner and to the same extent as if the whole issue rested on each individual and essential circumstance.²

Each fact necessary to the conclusion sought to be established must be proved beyond reasonable doubt.³

If the jury in making up their minds from circumstantial evidence have a rational doubt as to the existence of any one of the material circumstances attempted to be proved, that circumstance ought not to have any influence with them in forming their opinion respecting the guilt or innocence of the accused. In other words they ought "to discard such circumstance in making up their verdict."⁴

¹ See on this point Burr. Circ. Ev. pp. 136-138.

² Scott v. State, 19 Tex. Crim. App. 325; Harrison v. State, 6 Id. 42; State v. Glass, 5 Ore. 73.

³ Com. v. Webster, *supra*; State v. Glass, 5 Ore. 73; People v. Phipps, 39 Cal. 326; Black v. State, 1 Tex. Crim. App. 368; Gallagher v. State, 28 Tex. Crim. App. 247; Hawkins v. State (Tex.), 12 S. W. 490; Cranch v. State (Tex.), 12 S. W. 491; Shipp v. Com. (Va.), 14 Va. L. J. 176; 10 S. E. 1065; Riley v. State, 88 Ala. 198; Dick v. State, 87 Ala. 61; Perry v. State, 87 Ala. 30; State v. Bush, 122 Ind. 42; State v. Donahoe, 78 Iowa, 486; People v. Hare, 57 Mich. 505; Johnson v. State, 27 Neb. 687.

The following observations are extracted from the opinion of the court in People v. Aiken, 86 Mich. 460:

"The verdict of guilty in a criminal case resting upon circumstantial evidence is built upon a series of facts connected logically together, and one fact succeeding another in a certain order; one fact resting or depending upon another as a result of the preceding. These material and essential facts necessary to convict, following one another and each adding strength and conviction to the other and the whole, and which as a whole complete a perfect and irresistible chain, must each and every one be established and proved. Who can say that this chain so formed is a perfect and complete chain to a moral certainty, or beyond a reasonable doubt, if there be a want of such moral certainty or a reasonable doubt as to the existence of one of these links without which the chain is broken and incomplete? Each necessary link, each and every material and necessary fact upon which a conviction depends, must be proved beyond a reasonable doubt."

⁴ See opinion of BLACKFORD, J., in Sumner v. State, 5 Blackf. 579.

It is not, however, necessary that an immaterial fact should be so established.¹

There is no objection to an instruction which holds that the rule requiring proof beyond a reasonable doubt applies only to the material allegations of the indictment, but has no application to those mere evidentiary facts which the testimony of the witnesses may tend to establish.² It is sometimes said that *each fact relied upon* to prove the defendant's guilt ought to be established beyond a reasonable doubt. But this form of instruction ought to be avoided.

An alleged circumstance may be relied upon in the chain of circumstances by which the guilt of the accused is sought to be established or the conclusion reached, and yet not be essential to that conclusion. A circumstance may be relied upon by the prosecution as tending to prove facts from which the inference of guilt is to be drawn, and yet it may not be one of the circumstances from which the conclusion is drawn. The ultimate conclusion of guilt is drawn from certain essential facts, from the existence of which the mind is logically and irresistibly forced to infer the main fact to be proved. If one of these essential facts is wanting, the mind fails to reach the conclusion. A man is accused of the murder of his wife by the administration of a deadly poison. All the circumstances of the case point with almost absolute certainty to his guilt. The jury are satisfied of it beyond a reasonable doubt. He is proven to be devoid of affection for her. He has been seen to cruelly maltreat her. His conduct towards another woman establishes the fact that she has supplanted his wife in his affections. The poison has been found in the body of the deceased in a sufficient quantity to produce death. He is shown to have recently purchased the same kind of poison for the alleged purpose of killing a family dog. It is shown he had no dog. He has but recently caused the life of his wife to be insured. He has been heard to make threats and insinuations which, in the light of subsequent events, show that he expected her death at an early day. A witness is called for the prosecution who testifies that at a particular time he saw the accused in the company of the other woman under circumstances of very questionable propriety, and which, if believed,

¹ Early v. State, 9 Tex. Crim. App. 476.

² Jamison v. People, 145 Ill. 857.

would establish illicit intercourse between them. This last fact is relied upon as a link in the chain of circumstances to establish the fact of his guilt of the crime charged. The jury are fully satisfied of his guilt, but from the conduct or demeanor of the witness, or for some other cause, do not believe the story of the illicit intercourse. Must they therefore find the accused not guilty? Clearly not. That circumstance, though relied on, should be disregarded.¹

Occurrences may be mysterious and justify even vehement suspicion, and yet the supposed connection between them may be but imaginary, and their co-existence indicative of accidental concurrence merely, and not of mutual correlation.

Where the only evidence tending to connect the defendant with the theft of the alleged stolen animal was the fact that a brand on the animal had been altered—by whom did not appear—to make it resemble a brand claimed by defendant: this was held insufficient for conviction.²

“Where there is nothing but the evidence of circumstances to guide you,” said Mr. Justice Bailey, “those circumstances ought to be *closely and necessarily* connected, and to be made as clear as if there were absolute and positive proof.”³

Every circumstance, therefore, which is not clearly shown to be really connected as its correlative with the hypothesis it is supposed to support, must be rejected from the judicial balance; in other words, it must be distinctly established that there exists between the *factum probandum* and the facts which are adduced in proof of it, a real connection, either evident and necessary, or so highly probable as to admit of no other reasonable explanation.⁴

The following cases will serve to manifest the dangerous consequences which may ensue from the disregard of this most salutary cautionary rule:

Two brothers-in-law, Joseph Downing and Samuel Whitehouse, met by appointment to shoot, and afterwards to look at an estate, which on the death of Whitehouse's wife without issue would devolve on Downing. They arrived at the place of meeting on horseback, Downing carrying a gun-barrel and

¹ See opinion of the court in *Bradshaw v. State*, 17 Neb. 147.

² *Schaubert v. State*, 28 Tex. Crim. App. 222

³ *Rex v. Downing*, Salop Summer Ass., 1822, *infra*.

⁴ *Mittermaier*, *ut supra*, ch. 55, 57.

leading a colt. After the business of the day, and drinking together some hours, they set out to return home, Downing leading his colt as in the morning. Their way led through a gate opening from the turnpike-road, and thence by a narrow track through a wood. On arriving at the gate, Downing discovered that he had forgotten his gun-barrel; and a man who accompanied them to open the gate went back for it, returning in about three minutes. In the meantime Whitehouse had gone on in advance; and the prisoner having received his gun-barrel, followed in the same direction. Shortly afterwards Whitehouse was found lying on the ground in the wood, at a part where the track widened, about 600 yards from the gate, with his hat off, and insensible from several wounds in the head, one of which had fractured his skull. While the person by whom he was discovered went for assistance, the deceased had been turned over and robbed of his watch and money. About the same time Downing was seen in advance of the spot where the deceased lay, proceeding homeward and leading his colt; and a few minutes afterwards two men were seen following in the same direction. Suspicion attached to Downing, partly from his interest in the estate enjoyed by the deceased, and he was put upon his trial for this supposed murder; but it was clear that he had no motive on that account to kill the deceased, as the estate was not to come to him until after failure of issue of the deceased's wife, to whom he had been married several years without having had children; so that it was his interest that the way should not be open to a second marriage. That the deceased had been murdered at all was a highly improbable conjecture, and it was far more probable that he had fallen from his horse and received a kick, especially as his hat bore no marks of injury, so that it had probably fallen off before the infliction of the wounds. That the deceased, if murdered at all, had been murdered by the prisoner was in the highest degree improbable, considering how both his hands must have been employed, nor was there any evidence that the deceased had been robbed by the prisoner. It thus appeared that these accumulated circumstances, of supposed inculpatory presumptions, were really irrelevant and unconnected with any *corpus delicti*.¹ The prisoner was acquitted; and it is

- *Rex v. Downing*, Salop Sum. Ass., 1822, coram Mr Justice BAYLEY.

instructive that about twelve months afterwards the mystery of the robbery, the only real circumstance of suspicion, was cleared up. A man was apprehended upon offering the deceased's watch for sale, and brought to trial for the theft of it, and acquitted, the judge thinking that he ought not to be called upon, at so distant a period, to account for the possession of the deceased's property, which he might have purchased, or otherwise fairly acquired, without being able to prove it by evidence. The accused, when no longer in danger, acknowledged that he had robbed the deceased, whom he found lying drunk on the road, as he believed ; but that he had concealed the watch, on learning that it was supposed that he had been murdered, in order to prevent suspicion from attaching to himself.

A farmer was tried under the special commission for Wiltshire, in January, 1831, upon an indictment which charged him with having feloniously sent a threatening letter, which was alleged to have been written by him. That the letter was in the prisoner's handwriting was positively deposed by witnesses who had had ample means of becoming acquainted with it, while the contrary was as positively deposed on the part of the prisoner by numerous witnesses equally competent to speak to the fact. But the scale appears to have been turned by the circumstance that the letter in question, and two others of the same kind to other persons, together with a scrap of paper found in the prisoner's bureau, had formed one sheet of paper ; the ragged edges of the different portions exactly fitting each other, and the water-mark name of the maker, which was divided into three parts, being perfect when the portions of paper were united. The jury found the prisoner guilty, and he was sentenced to be transported for fourteen years. The judge and jury having retired for a few minutes, during their absence the prisoner's son, a youth about eighteen years of age, was brought to the table by the prisoner's attorney, and confessed that he had been the writer of the letter in question, and not his father. He then wrote on a piece of paper from memory a copy of the contents of the anonymous letter, which on comparison left no doubt of the truth of his statement. The writing was not a verbatim copy, although it differed but little ; and the bad spelling of the original was repeated in the copy. The original was then handed to him, and on being desired to do so,

he copied it, and the writing was exactly alike. Upon the return of the learned judge the circumstances were mentioned to him, and two days afterwards the son was put upon his trial and convicted of the identical offence which had been imputed to the father. It appeared that he had access to the bureau, which was commonly left open. The writing of the letter constituted in fact the *corpus delicti* ; there having been no other evidence to inculcate the prisoner as the *sender* of the letter, which would however have been the natural and irresistible inference if he had been the *writer*. The correspondence of the fragment of paper found in the prisoner's bureau with the letter in question, and with the two others of the same nature sent to other persons, was simply a circumstance of suspicion, but foreign, as it turned out, to the *factum* in question ; and considering that other persons had access to the bureau, its weight as a circumstance of suspicion seems to have been overrated.¹

But, perhaps, the most extraordinary and instructive case of this kind that has ever occurred, was that of Abraham Thornton, who was tried at the Warwick Autumn Assizes, 1817, before Mr. Justice Holroyd, for the alleged murder of a young woman, who was found dead in a pit of water, about seven o'clock in the morning, with marks of violence about her person and dress, from which it was supposed that she had been violated, and afterwards drowned. The deceased's bonnet and shoes and a bundle were found on the bank of the pit. Upon the grass, at the distance of forty yards, there was the impression of an extended human figure, and a large quantity of blood was upon the ground near the lower extremity of the figure, where there were also the marks of large shoe-toes. Spots of blood were traced for ten yards in a direction leading from the impression to the pit, upon a footpath, and about a foot and a half from the path upon the grass on one side of it. When the body was found, there was no trace of any footstep on the grass, which was covered with dew and not otherwise disturbed than by the blood ; from which circumstance it was insisted that the spots of blood must have fallen from the body while being carried in some person's arms. Upon the examination of the body, about half a pint of water and some duckweed

¹ *Rex v. Isaac Looker, Rex v. Edward Looker*, A. R. 1831, 9. And see Selections from the charges of Mr. Baron ALDERSON.

were found in the stomach, so that the deceased must have been alive when immersed in the water. There were lacerations about the parts of generation, but nothing which might not have been caused by sexual intercourse with consent. Soon after the discovery of the body, there were found in a newly harrowed field adjoining that in which the pit was situate the recent footmarks of the right and left footsteps of the prisoner and also of the footsteps of deceased, which, from the length and depth of the steps, indicated that there had been running and pursuit, and that the deceased had been overtaken. From that part of the harrowed field where the deceased had been overtaken, her footsteps and those of the prisoner proceeded together, walking in a direction towards the pit and the spot where the impression was found, until the footsteps came within the distance of forty yards from the pit, when from the hardness of the ground they could be no longer traced. The marks of the prisoner's running footsteps were also discovered in a direction leading from the pit across the harrowed field; from which it was contended that he had run alone in that direction after the commission of the supposed murder. The mark of a man's left shoe (but not proved to have been the prisoner's) was discovered near the edge of the pit, and it was proved that the prisoner had worn right and left shoes. On the prisoner's shirt and breeches were found stains of blood, and he acknowledged that he had had sexual intercourse with the deceased, but alleged that it had taken place with her own consent. The defence set up was an *alibi*, which, notwithstanding these apparently decisive facts, was most satisfactorily established. The prisoner and the deceased had met at a dance on the preceding evening at a public-house which they left together about midnight. About three in the morning they were seen talking together at a stile near the spot, and about four o'clock the deceased called at the house of Mrs. Butler, at Erdington, where she had left a bundle of clothes the day before. Here she appeared in good health and spirits, changed a part of her dress for some of the garments which she had left there, and quitted the house in about a quarter of an hour. Her way home lay across certain fields, one of which had been newly harrowed, and joined that in which the pit was situate. The deceased was successively seen after leaving Mrs. Butler's house by several persons, proceeding alone in a direction towards

her own home, along a public road where the prisoner, if he had rejoined her, could have been seen for a considerable distance; the last of such persons saw her within a quarter of an hour afterwards, that is to say, before or about half-past four. At about half-past four, and not later than twenty-five minutes before five, the accused was seen by four persons, wholly unacquainted with him, walking slowly and leisurely along a lane leading in an opposite direction from the young woman's course towards her home. About a mile from the spot where the prisoner was seen, he was seen by another witness about ten minutes before five, still walking slowly in the same direction, with whom he stopped and conversed for a quarter of an hour, after which, at twenty-five minutes past five, he was again seen walking towards his father's house, which was distant about half a mile. From Mrs. Butler's house to the pit was a distance of upwards of a mile and a quarter; and allowing twenty minutes to enable the deceased to walk this distance, would bring the time of her arrival at the pit to twenty-five minutes before five; whereas the prisoner was first seen, by four persons above all suspicion, at half-past four or twenty-five minutes before five, and the distance of the pit from the place where he was seen was two miles and a half. Upon the hypothesis of his guilt, the prisoner must have rejoined the deceased after she left Mrs. Butler's house, and a distance of upwards of three miles and a quarter must have been traversed by him, accompanied for a portion of it by the deceased, and the pursuit, the criminal intercourse, the drowning, and the deliberate placing of the deceased's bonnet, shoes, and bundle, must have taken place within twenty or twenty-five minutes. The defence was set up at the instant of the prisoner's apprehension, which took place within a few hours after the discovery of the body, and was maintained without contradiction or variation before the coroner's inquest and the committing magistrates, and also upon the trial, and no inroad was made on the credibility of the testimony by which it was supported. The various timepieces to which the witnesses referred, and which differed much from each other, were carefully compared on the day after the occurrence, and reduced to a common standard, so that there could be no doubt of the real times as spoken to by them. Thus, it was not within the bounds of possibility that the prisoner could have committed the crime

imputed to him ; nevertheless, public indignation was so strongly excited that his acquittal, though it afforded a fine example of the calm and unimpassioned administration of justice, occasioned great public dissatisfaction. There was, nevertheless, a total absence of all conclusive evidence of a *corpus delicti*, which the jury were required to infer from circumstances of apparent suspicion. The deceased might have drowned herself, in a moment of bitter remorse, after parting from her seducer, and excited to agonizing reflection by the sight of so many appalling marks of her ruin. It was possible that she might have sat down to change her dancing-shoes for the boots which she had worn the preceding day and carried in her bundle, and fallen into the water from exhaustion ; for she had walked to and from market in the morning, had exerted herself in dancing in the evening, and had been wandering all night in the fields without food. The allegation that the prisoner had violated the deceased, and therefore had a motive to destroy her, was mere conjecture ; and from the circumstance of her having been out all night with the prisoner, with whom she was previously unacquainted, and from the state of the garments which she took off at Mrs. Butler's, as compared with those for which she exchanged them, it was clear that the sexual intercourse had taken place before she called there, at which time she made no complaint, but appeared composed and cheerful. Again, the inference contended for, from the state of the grass, with drops of blood upon it where the dew had not been disturbed, was equally groundless ; for there was no proof that the dew had not been deposited after the drops of blood ; and it clearly appeared that the footsteps of the prisoner and the deceased could not be traced on other parts of the grass where, beyond all doubt, they had been together in the course of the night. Now, suppose that the *alibi* had been incapable of satisfactory proof, that the prisoner had not been seen after parting from the deceased, and that the inconclusiveness of the inference suggested from the discovery of drops of blood on the grass, where there were no footmarks, had not been manifested by the absence of those marks in other places where they had unquestionably been together in the night, the guilt of the prisoner would have been considered indubitable, and his execution certain ; and yet these exculpatory circumstances were entirely

collateral, and independent of the facts which were supposed to be clearly indicative of guilt.¹

¹ The friends of the deceased brought an appeal of death, in which the defendant tendered wager of battle, and the proceedings led to the abolition, by St. 59 G. III. c. 46, of that barbarous relic of feudal times. See *Ashford v. Thornton*, 4 B. & Ald. 405 ; *Short-hand Rep. and Observations upon the case of Abraham Thornton*, by Edward Holroyd, Esq., where the judge's notes of the evidence are given.

CHAPTER II.

THE BURDEN OF PROOF.

*The burden of proof is always on the party who asserts the existence of any fact which infers legal accountability.*¹

This is a universal rule of jurisprudence, founded upon evident principles of justice;² and it is a necessary consequence, that the affirmant party is not absolved from its obligation because of the difficulty which may attend its application. To prove a negative is in most cases difficult, in many impossible. And this rule has been adopted because the affirmative is capable of simple and direct proof of which the negative does not admit.³

No man can be justly deprived of his social rights but upon proof, that he has committed some act which legally involves the forfeiture of them. The law respects the *status in quo*, and regards every man as legally innocent until the contrary be proved.

Bigelow, J., after stating the general rule as to the burden of proof, remarked: "This results not only from the well-established principle that the presumption of innocence is to stand until it is overcome by proof, but also from the form of the issue in all criminal cases tried on the merits, which being always a general denial of the crime charged, necessarily imposes on the government the burden of showing affirmatively the existence of every material fact or ingredient, which the law requires in order to constitute an offence. If the act charged is justifiable or excusable, no criminal act has been

¹ 1 Greenl. Ev. § 74; *Stevenson v. Marony*, 29 Ill. 532; *McClure v. Purcell*, 6 Ind. 330; *Hampton v. State*, 1 Tex. Crim. App. 652; *Kelley v. People*, 17 Colo. 130.

² Such was the rule of the Roman law: *Ei incumbit probatio qui dicit, non qui negat*. Dig. lib. 22, tit. 8, b. 2.

³ 1 Greenl. on Ev. (14th Ed.) 105. See *Com. v. Treacy*, 8 Cush. 1; *Crowninshield v. Crowninshield*, 2 Gray, 524.

committed, and the allegations in the indictment are not proved. And this makes a broad distinction in the application of the rule of the burden of proof to civil and criminal cases. In the former, matters of justification or excuse must be specially pleaded in order to be shown in evidence, and the defendant is therefore, by the form of his plea, obliged to aver an affirmative, and thereby to assume the burden of establishing it by proof; while in the latter all such matters are open under the general issue, and the affirmative, namely, proof of the crime charged, remains in all stages of the case upon the government."¹

Criminality, therefore, is never to be presumed. But, nevertheless, the operation of this rule may, to a certain extent, be modified by circumstances which create a counter-obligation, and shift the *onus probandi*.

Lord Brougham said that the burden of proof often shifts about from one party to the other in the progress of a cause, according as the evidence raises a presumption one way or the other.²

It follows, from the very nature of circumstantial evidence, that, in drawing an inference or conclusion as to the existence of a particular fact from other facts that are proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded, either of explanation or contradiction.³

Lord Ellenborough said that no person accused of crime is bound to offer any explanation of his conduct, or of circumstances of suspicion which attach to him; but, nevertheless, if he refuse to do so, where a strong *prima facie* case has been made out, and when it is in his own power to offer evidence, if such exist, in explanation of such suspicious appearances, which would show them to be fallacious and explicable in consistency with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest.⁴

¹ Com. v. McKie, 1 Gray, 61.

² Wareing v. Wareing, 6 Moore's P. C. Rep. 355.

³ Per Lord Chief Justice ABBOTT, in Rex v. Burdett, 4 B. & Ald. 161.

⁴ Rex v. Cochrane, Gurney's Rep.

Therefore, while the burden of establishing the guilt of the accused is never shifted from the State,¹ it is a qualification of the rule in question, that in every case the *onus probandi* lies on the person who is interested to support his case by a particular fact, which lies more particularly within his own knowledge, or of which he is supposed to be cognizant. In a subsequent part of the opinion from which we quoted on a preceding page the learned judge said further: "There may be cases where a defendant relies on some distinct, substantive ground of defence to a criminal charge, not necessarily connected with the transaction on which the indictment is founded (such as insanity, for instance), in which the burden of proof is shifted upon the defendant."² This is not allowed to supply the want of necessary proof, whether direct or presumptive, against a defendant, of the crime with which he is charged; but when such proof has been given, it is a rule to be applied in considering the weight of the evidence against him, whether direct or presumptive, when it is unopposed, un rebutted, or not weakened by contrary evidence, which it would be in the defendant's power to produce, if the fact directly or presumptively proved were not true.³ It has been well observed, that in such cases we have something like an admission that the presumption is just.⁴ It would naturally happen that in most cases a *prima facie* case would satisfy the jury.⁵ But "in drawing an inference or conclusion, regard must always be had," as was said by the Lord Chief Justice Abbott;⁶ "to

¹ *People v. Marks*, 4 Park. Cr. R. 153; *State v. Wingo*, 66 Mo. 181; *Jones v. State*, 13 Tex. Crim. App. 1; *Turner v. Com.*, 86 Pa. St. 54.

"In every criminal case," said Judge CAMPBELL, in *People v. Millard*, 53 Mich. 63, "the burden is throughout upon the prosecution. Whatever course the defence deem it prudent to take in order to explain suspicious facts or remove doubts, yet it is incumbent on the prosecution to show under all circumstances, as a part of their own case, unless admitted or shown by the defence that there is no innocent theory possible which will, without violation of reason, accord with the facts. And in a case of alleged poisoning where the symptoms and appearances during the last illness become controlling facts in determining whether the death was from poison or from disease, the charge is not made out unless the prosecution negative everything but poison as the cause of death."

² Opinion of Mr. Justice BIGELOW, in *Com. v. McKie*, 1 Gray, 61.

³ Per Mr. Justice HOLROYD, in *Rex v. Burdett*, 4 B. & Ald. 140.

⁴ Per Mr. Justice BEST, *Id.* 122. ⁵ *State v. Wingo*, 66 Mo. 181.

⁶ *Rex v. Burdett*, 4 B. & Ald. 161.

the nature of the particular case, and the facility that appears to be afforded either of explanation or of contradiction. No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which the proof tends? The premises may lead more or less strongly to the conclusion, and care must be taken not to draw the conclusion hastily; but in matters that concern the conduct of men, the certainty of mathematical evidence cannot be required or expected; and it is one of the peculiar advantages of our jurisprudence, that the conclusion is to be drawn by the unanimous judgment and conscience of twelve men conversant with the affairs and business of life, and who know that when reasonable doubt is entertained, it is their duty to acquit; and not of one or more lawyers, whose habits might be suspected of leading them to the indulgence of too much subtlety and refinement." To the same effect Lord Chief Justice Tindal, on a trial for high treason, said, that "the offence charged against the prisoner must be proved by those who make the charge. The proof of the case against the prisoner must depend for its support not upon the absence or want of any explanation on the part of the prisoner himself, but upon the positive affirmative evidence of the guilt that is given by the crown. It is not, however, an unreasonable thing," said the learned judge, "and it daily occurs in investigations, both civil and criminal, that if there is a certain appearance made out against a party, if he is involved by the evidence in a state of considerable suspicion, he is called upon, for his own sake and his own safety, to state and bring forward the circumstances, whatever they may be, which might reconcile such suspicious appearances with perfect innocence.¹ But this doctrine, it has been well observed, is to be cautiously applied, and only in cases where it is manifest

¹ *Reg. v. Frost*, Monmouth Sp. Comm., Jan. 1840, Gurney's Report, 689. And see the language of Lord ELLENBOROUGH, in *Rex v. Despard*, 28 St. Tr. 521; and in *Rex v. Watson*, 32 Id. 583; and that of LE BLANC, J., in *Rex v. Mellor and others*, 31 St. Tr. 1032.

that proofs are in the power of the accused, not accessible by the prosecution."¹

Where a defence is set up, the burden of proof is on the defendant.² The State having made a *prima facie* case, the accused may overthrow it, and this is done when he raises a reasonable doubt as to the facts made by the State, or by proving an *alibi*, insanity, or any other defence inconsistent with guilt.³ Therefore, it is incontestably the rule that when a defendant sets up *alibi*⁴ or insanity⁵ he has the burden of establishing his defence. And it is sufficient to establish such facts and circumstances as will, in connection with the other evidence, engender in the minds of the jury a reasonable doubt of the truth of the charge.⁶ The defence need not be established by a preponderance of the evidence.⁷ An instruction imposes too great a burden of proof upon the defendant which declares that he must satisfy the jury beyond a reasonable doubt that the *alibi* is true;⁸ or that he must establish it to the jury's satisfaction.⁹ And where an *alibi* is set up, an instruction that it will be the duty of the jury to acquit all or such of the defendants as they believe not to have been present at the commission of the crime, is erroneous. They should be directed to acquit all as to whose presence they have a reasonable doubt.¹⁰ On the other hand, an instruction that defendant relies upon an *alibi*, and that if it is established it is a complete defence, is not misleading as placing the burden of establishing the *alibi* on defendant, where the jury are elsewhere informed that the People must establish every requisite to a conviction by evidence which removes every reasonable doubt from the minds of the jury.¹¹ And the statement by the

¹ Per SHAW, C. J., in Webster's Case, *ut supra*, 467.

² State v. Grear, 29 Minn. 24; People v. Bell, 49 Cal. 486.

³ State v. Paulk, 18 S. C. 514.

⁴ Garetz v. People, 107 Ill. 162; State v. Waterman, 1 Nev. 543; Rudy v. Com., 128 Pa. St. 500; Carlton v. People 150 Ill. 181. See, however, State v. Chee Gong, 19 Pac. 607.

⁵ Lake v. People, 1 Park. Cr. R. 495; Laros v. Com., 84 Pa. St. 200; State v. Henrick, 62 Ia. 414; Newcomb v. State, 37 Miss. 333; Loeffner v. State, 10 Ohio St. 598; Graham v. Com., 16 B. Mon. 587; State v. DeRance, 34 La. Ann. 186; People v. Messersmith, 61 Cal. 246.

⁶ Carlton v. People 150 Ill. 181.

⁷ State v. Taylor, 118 Mo. 153.

⁸ Miles v. State, 93 Ga. 117.

⁹ Prince v. State, 100 Ala. 144.

¹⁰ Garcia v. State (Fla.), 16 So. 223.

¹¹ People v. Fuhrman (Mich.), 61 N. W. 865.

court, that an *alibi* is a good defence if proved, is not erroneous or misleading, where the jury are directed in the same connection that if they have a reasonable doubt of the presence of the accused at the place of the commission of the crime, at the time thereof, they must acquit.¹

Every person accused of crime is presumed to be sane, and that legal presumption is all the proof required of the prosecution. If the defence insists upon insanity as an excuse for the defendant's action, the burden is upon him to establish it.² The rule is stated in language to the effect that the sanity of one accused of crime will be presumed until rebutted by satisfactory proof.³ In a recent case in Massachusetts the court said that the burden resting upon the government, "so far as the matter of insanity is concerned, is ordinarily satisfactorily sustained by the presumption that every person of sufficient age is of sound mind and understands the nature of his acts."⁴ But when the circumstances are all in, on the one side going to show a want of adequate capacity, on the other side going to show usual intelligence, the burden rests where it was in the beginning—upon the government.⁵

In Louisiana the accused has the burden of establishing the plea of insanity relied upon by him to the satisfaction of the jury beyond a reasonable doubt.⁶ The rule generally adopted is that when the defence of insanity is relied upon, if the evidence introduced tends to rebut the presumption of sanity on the part of the accused, and the jury entertain a reasonable doubt, after due consideration of all the evidence, as to his sanity, it is their duty to acquit.⁷

It is a necessary consequence of this rule, rather than a substantive rule, that the *corpus delicti* must be clearly proved before any effect is attached to circumstances supposed to be inculpatory of a particular individual; but this is a branch of the subject of so much importance and of such comprehensive extent, as to require consideration in a more extended manner.

¹ State v. Price (Kan.), 41 Pac. 1001.

² Faulker v. Terr. (N. M.), 30 Pac. 905; Guetig v. State, 66 Ind. 94. See O'Connell v. People, 87 N. Y. 377; Cogle v. Com., 160 Pa. St. 573.

³ State v. Harrigan, 9 Houst. 369. And see State v. Hartley (Nev.), 40 Pac. 372.

⁴ State v. Hansen (Ore.), 36 Pac. 296.

⁵ Pomeroy's Case, 117 Mass. 143. See further Ballard v. State, 19 Neb. 609.

⁶ State v. Clements, 47 La. Ann. 1038.

⁷ Armstrong v. State, 30 Florida, 170; 17 L. R. A. 484.

CHAPTER III.

THE BEST EVIDENCE MUST BE ADDUCED.

In all cases, whether of direct or circumstantial evidence, the best evidence must be adduced which the nature of the case admits. The rule which requires the production of the best evidence is applied to reject secondary evidence which leaves that of a higher nature behind in the power of the party.¹ The suppression or non-production of pertinent and cogent evidence necessarily raises a strong presumption against the party who withholds such evidence when he has it in his power to produce it. Some interesting exemplifications of this are to be found in another part of this volume.²

This rule applies *à fortiori* to circumstantial evidence, a kind of proof which, for reasons which have been already urged, is inherently inferior to direct and positive testimony; and, therefore, whenever such evidence is capable of being adduced, the very attempt to substitute a description of evidence not of the same degree of force, necessarily creates a suspicion that it is withheld from corrupt and sinister motives.³ When it is disclosed that direct evidence is probably in existence, circumstantial evidence cannot be resorted to without accounting for the absence of the direct evidence.⁴

Circumstantial evidence is not admissible to prove the *corpus delicti* when better evidence is attainable. Where the defendant was charged with an assault, it was held that circumstantial evidence was not legitimate to prove the assault and to connect the defendant with it when the victim, for all that appeared, might have been called as a witness.⁵

¹ U. S. v. Gilbert, 2 Sumn. 19.

² See *ante*, 138 *et seq.*

³ See *ante*, 142; JERVIS, C. J., in *Twyman v. Knowles*, 13 C. B. 224; 76 E. C. L.; *Cutbush v. Gilbert*, 4 S. & R. 551; *Taylor v. Riggs*, 1 Pet. S. C. Rep. 596.

⁴ *Gabrielsky v. State*, 13 Tex. Crim. App. 428.

⁵ *Porter v. State*, 1 Tex. Crim. App. 394.

Where non-consent is a principal ingredient in the offence, direct proof alone from the person whose non-consent is necessary can satisfy the rule. Other and inferior proof cannot be resorted to till it be impossible to procure this best evidence.¹

In such cases, mere presumptive, *prima facie*, or circumstantial evidence is secondary in degree, and cannot be used till all the sources of direct evidence are exhausted.²

Circumstantial evidence is admissible to prove the want of the owner's consent to the taking of property only when the owner is inaccessible by the use of ordinary diligence or beyond the reach of legal process.³ When it is shown that direct testimony cannot be produced, and that the failure to produce it is not attributable to any want of diligence, or to any fault on the part of the prosecution, then it is perfectly proper to resort to circumstantial evidence.⁴

On an indictment under an old statute, now repealed, in England, for lopping a timber tree without the consent of the owner, the land-steward was called to prove that he himself never gave any consent, and from all he had heard his master say (the master having died before the trial) he believed he never did. It was left to the jury to say whether they thought there was reasonable evidence to show that in fact no consent had been given. Bayley, J., adverted to the time of night when the offence was committed, and to the circumstance of the prisoner moving away when detected, as evidence to show that the consent required had not, in fact, been given. And the master, previous to his death, had ordered that the prisoner should be apprehended on suspicion.⁵

A jury ought not to be told that a conviction ought not to be had on circumstantial evidence when positive evidence is attainable, when, in fact, no positive evidence is attainable in the case.⁶

Nor is the application of the rule confined to the proof of the principal fact; it is "the master rule which governs all the

¹ *Chisholm v. State*, 45 Ala. 66; *Dixon v. State*, 15 Tex. Crim. App. 480.

² *Williams v. East India Co.*, 3 East, 192.

Love v. State, 15 Tex. Crim. App. 568.

⁴ *Clayton v. State*, 15 Tex. Crim. App. 348. See also *Schultz v. State*, 20 Tex. Crim. App. 308; *Williams v. State*, 19 Id. 276; *Trafton v. State*, 5 Id. 480; *Foster v. State*, 4 Id. 246.

⁵ *Rex v. Hagy*, 2 C. & P. (12 E. C. L.) 458. See also *Rex v. Allen*, 1 Moo. C. C. 154.

⁶ *Coleman v. State*, 87 Ala. 14.

subordinate rules ;”¹ and applies alike to the proof of every individual constituent fact, whether principal or subordinate. Thus, in a trial for murder, Mr. Baron Maule refused to receive evidence of the contents of a coffin-plate in order to establish the identity of the deceased, on the ground that, being removable, it might have been produced, and there being no other case of identity, stopped the case.² The rule is, however, necessarily relaxed, where its application becomes impracticable by the wrongful act of the party who would otherwise be entitled to claim its protection ; as where a witness is kept out of the way by or on his behalf,³ or a deed or other instrument in his possession, which he refuses, after notice, to produce.⁴

Considering, moreover, the inherent infirmity of human memory, in the fair construction and application of this rule, evidence ought, in all criminal cases, and *a fortiori* in cases of circumstantial evidence, to be received with distrust, wherever any considerable time has elapsed since the commission of the alleged offence. The justice and efficacy of punishment, and more especially of capital punishment, inflicted after the lapse of any considerable interval, at least where the offender has not withdrawn himself from the reach of justice, are more than questionable.⁵ An unavoidable consequence of great delay is, that the party is deprived of the means of vindicating his innocence, or of proving the attendant circumstances of extenuation ; the crime itself becomes forgotten, or is remembered but as a matter of tradition, and the offender may have become a different moral being : in such circumstances punishment can seldom, perhaps never, be efficacious for the purpose of example. On these accounts judges and juries are now always reluctant to convict parties charged with offences committed long previously.

¹ 2 Burke's Works, *ut supra*, 618 ; Mittermaier, *ut supra*, ch. 57.

² Reg. v. Edge, Chester Spr. Ass., 1842.

³ Hawk, P. C. Bk. 2, c. 46, § 15 ; R. v. Guttridge, 9 C. & P. 471 ; Reg. v. Scaife, 20 L. J. M. C. 229.

⁴ Rex v. Hunter, 3 C. & P. 491 ; 4 Id. 128 ; Rex v. Haworth, 4 C. & P. 254 ; and see *ante*, Ch. III. § 7.

⁵ Rex v. Horne, executed at Nottingham in 1759, for the murder of his natural child forty years before, 4 Cel. Trials, 396 ; and Rex v. Wall, 28 St. Tr. 51, whose execution took place after the lapse of twenty years from the commission of the offence ; and see the strictures of Lord CAMPBELL on the case, 3 Lives of the C. Justices, 147 ; and Rex v. Roper, Leicester Sum. Ass., 1836, for a murder committed thirty-four years before, A. R. 1836.

CHAPTER IV.

THE QUANTITY OF EVIDENCE NECESSARY TO CONVICT.

SECTION I.

The Facts must be Incompatible with Innocence.

*In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.*¹ This is the fundamental rule, the *experimentum crucis* by which the relevancy and effect of circumstantial evidence must be estimated. The circumstances which will amount to proof sufficient to justify a conviction can never be matter of general definition.² Mere suspicion, or grave suspicion, is not enough to convict.³ And an instruction is erroneous from which the jury may gather that they may convict on a preponderance of evidence.⁴ Circumstances are sufficient to convict when they are irreconcilable with any reasonable hypothesis of the prisoner's innocence.⁵

It is not necessary to prove such coincidence of circumstances as excludes *every* hypothesis but the guilt of the prisoner.⁶

The existence of the inculpatory facts need not be absolutely incompatible with the innocence of the accused, since that is to ask for proof of guilt beyond the possibility of a doubt,⁷ while neither the criminal act nor the wicked intent need be proved beyond the possibility of a doubt.⁸ The truth of any

¹ Hunt v. State, 1 Crim. L. Mag. 234; State v. Miller, 9 Houst. 564.

² Powers v. State, 16 Tex. 546.

³ State v. Clouser, 69 Ia. 313.

⁴ Gill v. State, 59 Ark. 422.

⁵ Kehoe v. Com., 85 Pa. St. 127; State v. Johnson, 19 Ia. 230; Beavers v. State, 58 Ind. 530.

⁶ Garrett v. State, 97 Ala. 18; State v. Matthews, 66 N. C. 106; State v. Schoenwald, 31 Mo. 147; Horn v. State (Ala.), 15 So. 278.

⁷ Carlton v. People, 150 Ill. 181; People v. Murray, 41 Cal. 66; U. S. v. Cassidy, 67 Fed. Rep. 698.

⁸ State v. Daley, 41 Vt. 564.

fact which is to be proven by evidence cannot be established beyond the possibility of a doubt, and yet the jury may be entirely satisfied of its truth.¹ An "undoubting" conviction of guilt need not be produced.² It is not, therefore, necessary that the circumstances should include all possibility that another than the accused committed the crime.³ And an instruction ought not to be given from which the jury can take the meaning, that if they believe from the evidence that it is *possible* some other person than the defendant committed the crime they ought to acquit, no matter how strong, consistent with such possibility, the evidence might be for the State.⁴ But moral certainty must be produced.

Where the counsel for defendant argued that the guilt of the accused must be so clearly demonstrated as to answer or rebut every suggestion or doubt that the ingenuity of counsel can devise, the court said that while everything relating to human affairs depending on moral evidence is open to some possible or imaginary doubt, still circumstantial evidence can be relied on as sufficient when it excludes, to a moral certainty, every other reasonable hypothesis except that of guilt.⁵ And it has been held that in this connection the word *conclusion* is properly used instead of *hypothesis*.⁶ The hypothesis of guilt must flow naturally from the facts proved and be consistent with them all.⁷

It is not sufficient that the circumstances proved coincide with, account for, and therefore render probable, the hypothesis sought to be established, but they must exclude to moral certainty every hypothesis but the single one of guilt.⁸

The evidence is always insufficient, where, assuming all to be proved which the evidence tends to prove, some other hypothesis may still be true; for it is the actual exclusion of every hypothesis which invests mere circumstances with the

¹ *People v. Padillia*, 42 Cal. 535.

² *State v. Paxton*, 126 Mo. 500.

³ *People v. Foley*, 59 Mich. 553; *Houser v. State*, 58 Ga. 78.

⁴ *Sumner v. State*, 5 Blackf. 579; *Findley v. State*, 5 Blackf. 576.

⁵ *Lopez v. State*, 20 S. W. 395. And see *Jefferds v. People*, 5 Park. Cr. R. 523; *Turner v. State*, 4 Lea, 206; *Yarbrough v. State* (Ala.), 16 So. 758; *People v. Armstrong*, 56 Cal. 397; *People v. Nelson*, 85 Cal. 421.

⁶ *State v. Willingham*, 83 La. Ann. 537.

⁷ *People v. Bennett*, 49 N. Y. 137; *Ward v. State*, 10 Tex. Crim. App. 293.

⁸ *Burr. Circ. Ev.* p. 181; *State v. Moxley*, 102 Mo. 374; *State v. Taylor*, 111 Mo. 588; *People v. Dick*, 32 Cal. 213.

force of proof. Whenever therefore the evidence leaves it indifferent which of several hypotheses is true, or merely establishes some finite probability in favor of one hypothesis rather than another, such evidence cannot amount to proof, however great the probability may be.¹

The true test by which to determine the value of circumstantial evidence, in respect to its sufficiency to warrant a conviction in a criminal case, is, not whether the proof establishes circumstances which are consistent, or which coincide with the hypothesis of the guilt of the accused, but whether the circumstances satisfactorily established are of so conclusive a character, and point so surely and unerringly to the guilt of the accused as to exclude every reasonable hypothesis of his innocence. The force of circumstantial evidence being exclusive in its character, the mere coincidence of a given number of circumstances with the hypothesis of guilt, or that they would account for, or concur with, or render probable the guilt of the accused, is not a reliable or admissible test, unless the circumstances rise to such a degree of cogency and force, as, in the order of natural causes and effect, to exclude, to a moral certainty, every other reasonable hypothesis except the single one of guilt.²

This rule was thus commented on by that admirable lawyer, Rufus Choate, in his address to the jury in the famous Dalton divorce case:³ "It is a rule that may be called a golden rule in the examination and application of this kind of evidence which we call circumstantial, that should it so turn out that every fact and circumstance alleged and proved to exist is consistent on the one hand with the hypothesis of guilt, and on the other hand consistent reasonably and fairly with the hypothesis of innocence, then those circumstances prove noth-

¹ Stark on Ev. (10th Am. Ed.) 859; Wharton v. State, 12 So. 661; Algheri, v. State, 25 Miss. 594. It is not therefore sufficient that the circumstances pointing to guilt create a probability—even a strong probability—of the guilt of the accused. Dreesen v. State, 38 Neb. 375.

² Binns v. State, 66 Md. 428; Riley v. State, 88 Ala. 193; Stout v. State, 90 Ind. 1; People v. Strong, 30 Cal. 157; People v. Shuler, 28 Cal. 490; Cavender v. State, 126 Ind. 47; Sumner v. State, 5 Blackf. 579; The Jane v. U. S., 7 Cranch, 363; Casey v. State, 20 Neb. 138; State v. Maxwell, 42 Ia. 208; Com. v. Cobb, 14 Gray, 57; State v. Ah Kung, 17 Nev. 361; State v. Hunter, 32 Pac. 37; State v. Davenport (Ga.), 7 S. E. 87.

³ Before the Supreme Judicial Court of Massachusetts, May, 1856.

ing at all.¹ Unless they go so far as to establish a necessary conclusion of this guilt which they offered with a view to establish, they are utterly worthless and ineffectual for the investigation of the truth. It is not enough that the circumstances relied on are plainly and certainly proved. It is not enough to show that they are consistent with the hypothesis of guilt. They must also render the hypothesis of innocence inadmissible, and impossible, unreasonable, and absurd, or they have proved nothing at all."

Evidence which satisfies the minds of the jury to a moral certainty constitutes full proof.² The law does not require that guilt shall be established by evidence which amounts to mathematical certainty. Moral certainty is all that can be required.³

It is perhaps well to set out here some of the most commendable judicial definitions of this phrase, "moral certainty." When the jury are convinced to a moral certainty they may be said to be entirely satisfied.⁴

There is a degree of doubt which belongs to all human affairs. One may sometimes doubt what is seen, very often what is heard; our senses often deceive us. On the other hand there is a degree of certainty with which we are compelled to be satisfied in the most serious transactions of life; and as no higher degree of certainty is ordinarily attainable in human affairs, it is that degree of certainty with which we must be satisfied in criminal trials.⁵ The jury ought to have the highest degree of certainty which the practical business of life admits of.⁶

Moral certainty is a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it.⁷ It is that

¹ 3 Greenl. on Ev. § 29, n. 2; *State v. Flanagan*, 26 W. Va. 116.

² *James v. State*, 45 Miss. 572; *State v. Brown* (Kan.), 40 Pac. 1001.

³ *Giles v. State*, 6 Ga. 276. In *People v. Beck*, 58 Cal. 212, a charge that "the persuasion of guilt produced by the evidence ought to amount to almost a certainty, or such a certainty as convinces the minds of the jury as reasonable men," was held not to be erroneous, though unsatisfactory.

⁴ *State v. Milling*, 35 S. C. 16; *People v. Padillia*, 42 Cal. 535.

⁵ POLLOCK, C. B., in *Reg. v. Exall*, *supra*.

⁶ *Reg. v. Kohl*, C. C. C., Jan. 1865, coram POLLOCK, C. B.

⁷ *Com. v. Webster*, *supra*; *James v. State*, 45 Miss. 572; *State v. Orr*, 64 Mo. 339.

degree of certainty which is supported by reason or probability, founded on the experience of the ordinary course of things, and must be reasonable in itself.¹ And it has been well defined as that state of the judgment, grounded upon an adequate amount of appropriate evidence, which induces a man of sound mind to act without hesitation in the most important concerns of human life.

In cases of direct credible evidence, that degree of assurance immediately and necessarily ensues; but in estimating the effect of circumstantial evidence, there is of necessity an ulterior intellectual process of inference which constitutes an essential element of moral certainty. The most important part of the inductive process, especially in moral inquiries, is the correct exercise of the judgment in drawing the proper inference from the known to the unknown, from the facts proved to the *factum probandum*. A number of secondary facts of an inculpatory moral aspect being given, the problem is to discover their casual moral source, not by arbitrary assumption, but by the application of the principles of experience in relation to the immutable laws of human nature and conduct. It is not enough, however, that a particular hypothesis will explain all the phenomena; nothing must be inferred, because, if true, it would account for the facts; and if the circumstances are equally capable of solution upon any other reasonable hypothesis, it is manifest that their true moral cause is not exclusively ascertained, but remains in uncertainty;² and they must therefore be discarded as conclusive presumptions of guilt. If the inculpatory facts and circumstances, in any given case, are capable of two or more explanations, one of which is consistent with the innocence of the accused, and the other consistent only with his guilt, then the evidence does not fill the test of moral certainty, and is insufficient to support conviction.³ Every other reasonable supposition by which the facts may be explained consistently with the hypothesis of innocence must therefore be rigorously examined and successively eliminated; and only when no other supposition will reasonably account for all the conditions of the case, can the conclusion of guilt be legitimately adopted.⁴

¹ *Pharr v. State*, 10 Tex. Crim. App. 485.

² *Casey v. State*, 20 Neb. 138. ³ *Pogue v. State*, 12 Tex. Crim. App. 283.

⁴ *Mittermaier, ut supra*, ch. 59.

Although the mystery of the crime cannot be solved from the evidence except upon the supposition of the defendant's guilt, a conviction cannot follow. The life or liberty of a person cannot be legally sacrificed on the ground that it is only by regarding him as guilty, that an explanation is afforded of the perpetration of a proved offence.¹

In a case before the Court of Justiciary at Edinburgh, the Lord Justice Clerk Cockburn said that the matter might remain most mysterious, wholly unexplained; they might not be able to account for it on any other supposition than that of the prisoner's guilt; but that still that supposition or inference might not be a ground on which they could safely and satisfactorily rest their verdict against her.²

But nevertheless it seems hardly possible to conceive of such a state of facts. If, however, the hypothesis fulfils the required conditions, the conclusion is no longer a gratuitous assumption, but becomes, as it were, part of the induction; and an additional test is obtained, by which, as by the application of a theorem of verification, the conclusion may be tested, and, if true, corroborated and confirmed; since, if it be true, it must harmonize with, and satisfactorily account for, all the facts, to the exclusion of every other reasonable hypothesis.³ In accordance with these sound principles of reasoning and inference, Lord Chief Baron Macdonald said that he had ever understood the rule as to circumstantial evidence to be that where the circumstances are true, where they are well connected, where they support each other in a clear and lucid manner, and where they cannot reasonably be accounted for unless the charge be true that is imputed to the prisoner, then the jury were justified in convicting upon that evidence.⁴ On another occasion the same learned judge said that the nature of circumstantial evidence was this, that the jury must be satisfied that there is no rational mode of accounting for the circumstances, but upon the supposition that the prisoner is guilty.⁵ Mr. Baron Alderson, with more complete exactness, said that to enable the jury to bring in a verdict of guilty, it

¹ *Schulsler v. State*, 29 Ind. 394.

² *Reg. v. Madeleine Smith*, Rep. *ut supra*, 303.

³ *Mittermaier*, *ut supra*, ch. 59.

⁴ *Rex v. Smith*, for arson, *ut supra*, p. 80.

⁵ *Rex v. Patch*, Surrey Spr. Ass., 1805.

was necessary, not only that it should be a rational conviction, but that it should be the only rational conviction which the circumstances would enable them to draw.¹ In *Humphreys'* case, Lord Meadowbank said to the jury: "Your duty is to consider what is the reasonable inference to be drawn from the whole circumstances; in short, whether it is possible to explain the circumstances upon grounds consistent with the innocence to the panel, or whether, on the contrary, they do not necessarily lead to a result directly the reverse."²

In a court whose judgments have always been entitled to respect, an instruction that "in order to convict circumstantial evidence should be such as to produce nearly the same degree of certainty as that which arises from direct testimony, and to exclude a rational probability of innocence," was some years since held free from error.³ But later decisions have questioned this ruling and declared the instruction to be of extremely doubtful propriety.⁴ And in a very recent case, where the question came directly before the court, a similar instruction was declared erroneous, as in such case the jury must be satisfied beyond a reasonable doubt.⁵

And there is no such rule for estimating the weight of circumstantial evidence as that the circumstances necessary to convict must be as strong as the testimony of one credible eye-witness who swears positively that the prisoner did commit the offence.⁶ On the contrary, it is proper to instruct that where the evidence is not only consistent with the guilt of the defendant, but inconsistent with any other rational conclusion, the jury should convict, notwithstanding such evidence may not be as satisfactory as the direct testimony of credible eye-witnesses.⁷

The phrase "*absolute moral certainty*" is disapproved. It excludes not only reasonable doubt, but all doubt.⁸ It suggests

¹ *Rex v. Hodges*, 2 Lewin's C. C. 227. ² Swinton's Rep. *ut supra*, 353.

³ *People v. Craine*, 34 Cal. 191. And see *People v. Padillia*, 42 Cal. 535.

⁴ *People v. Eckman*, 72 Cal. 532; *People v. Sansome*, 84 Cal. 449.

⁵ *State v. Ryan*, 12 Mont. 297.

⁶ *State v. Coleman*, 22 La. Ann. 455; *State v. Allen*, 103 N. C. 433; *State v. Norwood*, 74 N. C. 247; *State v. Gee*, 92 N. C. 756; *Banks v. State*, 72 Ala. 522; *Mickle v. State*, 27 Ala. 20; *Faulk v. State*, 52 Ala. 415; *State v. Carson* (N. C.), 20 S. E. 324.

⁷ *State v. Slingerland*, 19 Nev. 135.

⁸ *State v. Glass*, 5 Ore. 73; *State v. Hogard*, 12 Minn. 293.

a degree of certainty greater than moral certainty, and a court is justified in refusing to give an instruction containing such phrase.¹

Evidence may not be sufficient to produce in the minds of a jury an *absolute certainty* of the defendant's guilt, nor to prove that he had any motive to commit the crime charged, and yet be strong enough to satisfy the jury *beyond a reasonable doubt* that he was guilty.²

A presumption may be applied when the circumstances are such as to render the opposite hypothesis improbable. If the latter be rendered exceedingly remote and improbable, and morally, though not absolutely, impossible, the former is established as morally true.³

It is common to charge that the State must make out a case against the prisoner beyond a reasonable doubt,⁴ or that the circumstances must be such as to satisfy the jury beyond a reasonable doubt of the defendant's guilt,⁵ or that if the jury are satisfied beyond a rational doubt of guilt they must convict.⁶ And the defendant had no ground of complaint in an instruction which charged in effect that the evidence must be sufficient in law to remove all reasonable doubt; that if there was any other reasonable hypothesis upon which it could be placed, then there would be room for reasonable doubt, and if they had a reasonable doubt, it was their duty to give the defendant the benefit of it and to acquit him; but whether the testimony be positive or circumstantial, if it removed from their minds all such reasonable doubt, then it would be sufficient to authorize them to convict.⁷ But to convince beyond a reasonable doubt, the circumstances must exclude to a moral certainty every other hypothesis but the single one of guilt.⁸

A charge that the defendant should be found not guilty unless the evidence against him was such as to exclude to a

¹ *People v. Davis*, 64 Cal. 440.

² *Sumner v. State*, 5 Blackf. 579.

³ *Chisholm v. State*, 45 Ala. 66. But where it had been charged that "the circumstances relied upon, taken together, must be of a conclusive nature, leading on the whole to an absolute certainty in the minds of the jury that the defendant is guilty beyond a reasonable doubt," this was approved. *Taylor v. State*, 3 Tex. Crim. App. 169.

⁴ *Houser v. State*, 58 Ga. 78.

⁵ *Phipps v. State*, 3 Cold. 344; *Schoolcraft v. People*, 117 Ill. 271.

⁶ *State v. Frank*, 5 Jones' L. 384.

⁷ *Bryan v. State*, 74 Ga. 393.

⁸ *Black v. State*, 1 Tex. Crim. App. 368.

moral certainty every supposition but that of guilt, is properly explained by the further statement that the jury must be satisfied beyond a reasonable doubt of the defendant's guilt.¹

The phrases, "proof to a moral certainty," and "proof beyond a reasonable doubt," are synonymous; each signifies such proof as satisfies the judgment and consciences of the jury, as reasonable men, and applying their reason to the evidence before them that the crime charged has been committed by the defendant, and so satisfies them as to leave no other reasonable conclusion possible.²

If the jury are not morally certain of every fact necessary to guilt, they cannot be said to be without reasonable doubt.³ But it is erroneous to instruct that persons sometimes say they are morally certain of the existence of a fact or facts, but have not the evidence to prove it, and that this is the condition of mind one is in when convinced beyond a reasonable doubt.⁴

Reasonable certainty implies the absence of reasonable doubt; and telling the jury that they must be convinced of a fact with reasonable certainty is almost, if not quite, the same as telling them that they must be convinced of it beyond a reasonable doubt.⁵

Where the jury were told that the evidence must show the guilt of the defendant to their reasonable satisfaction, that their best judgments must be that the defendants were guilty, so that the mind might rest easy in the conclusion of guilt, it was unnecessary to charge that guilt must be shown beyond reasonable doubt.⁶

And the court, having charged that guilt must be proved to the exclusion of all reasonable doubt, and that if the testimony could be reconciled with any other rational theory than guilt they should acquit, may decline to charge that guilt must be proved to a moral certainty.⁷

It is always safer to lay down familiar rules of this character in language universally approved, than to undertake to give a new version in more doubtful language.⁸

¹ *Turbeville v. State*, 40 Ala. 715.

² *Com. v. Costley*, 118 Mass. 1; *Ryan v. State*, 88 Wis. 486. And see *Carlton v. People* (Ill.), 87 N. E. 244.

³ *Williams v. State*, 52 Ala. 411.

⁴ *Heldt v. State*, 20 Neb. 498. And see *Young v. State*, 95 Ala. 4.

⁵ *McBee v. Bawman*, 89 Tenn. 132.

⁶ *Purkey v. State*, 3 Heisk. 26; *Lawless v. State*, 4 Lea, 178.

⁷ *Hall v. People*, 39 Mich. 717.

⁸ *Turner v. State*, 4 Lea, 206.

In trying a case depending upon circumstantial evidence very few abstract principles should be given to the jury. Left to exercise their common sense in their own way, the jury will generally determine correctly what is well proved, and what lacks further support. Furnished with a superfluity of rules, their attention is distracted, and the proffered help only obstructs. The better practice is to decline charging refined speculations, and give only sharp-cut law. What shall come to the jury as evidence is for the court; what it is worth is for the jury. They can discern its true value with spare assistance from the bench.¹

It is a settled rule of practice in Texas that where the evidence is wholly circumstantial, the court must, whether asked to or not, instruct the jury as to the nature and conclusiveness of that character of evidence.² And a judgment of conviction will be reversed because of failure to comply with this rule, though there is no probability that, had the charge been given, the result would have been different.³ This rule holds good though the *corpus delicti* is proved by positive testimony, if the evidence tending to fix the guilt upon the prisoner is wholly circumstantial.⁴ But where a case is not dependent alone, or in a controlling degree, upon circumstantial evidence, a special charge is not required.⁵ Where there is direct evidence of the main fact and the circumstantial evidence adduced is merely in corroboration, the court is not required to

¹ BLECKLEY, J., in *Monghan v. State*, 57 Ga. 102.

² *Allen v. State*, 16 Tex. Crim. App. 237; *Thomas v. State*, 18 Id. 498; *Faulkner v. State*, 15 Id. 115; *Kenneda v. State*, 16 Id. 258; *Ramirely v. State*, 20 Id. 183; *Lee v. State*, 14 Id. 266; *Harrison v. State*, 6 Id. 42; *Jackson v. State*, 20 Id. 190; *Ray v. State*, 18 Tex. Crim. App. 51; *Barr v. State*, 10 Id. 507; *Black v. State*, 18 Id. 124; *Murphy v. State*, 17 Id. 645; *Crowley v. State*, 26 Id. 578.

³ *Counts v. State*, 19 Tex. Crim. App. 450; *Cooper v. State*, 16 Id. 841; *Daniels v. State*, 14 S. W. 395.

⁴ *Eckert v. State*, 9 Tex. Crim. App. 105. Where the pressure of the case is not upon the *corpus delicti* which has been clearly proven, but upon the question who is guilty party, and all the evidence inculcating accused is circumstantial, it is error for the court to instruct that the case is not founded altogether in circumstantial evidence. *Simmons v. State*, 95 Ga. 224.

⁵ *Tooney v. State*, 8 Tex. Crim. App. 452; *Buntain v. State*, 15 Id. 515; *Mackey v. State*, 20 Id. 603; *House v. State*, 19 Id. 227; *Sharp v. State*, 17 Id. 486; *Clare v. State*, 26 Id. 624; *Leeper v. State*, 29 Id. 154.

charge the law on the latter kind of evidence.¹ An omission to charge must be excepted to at the time.² A charge to a jury is perfectly unexceptionable only when the judge confines himself to the duty of setting forth the law applicable to the case, without expressing or intimating any opinion as to the weight of the evidence, or the credibility of the statements made of the party accused or of the witness.³ A statement that the State relies on circumstantial evidence, introductory to an instruction as to the cogency of such evidence, is not a charge as to the weight of evidence.⁴ But the following charge has been held to be upon the weight of evidence and therefore improper: "Circumstantial evidence, when fully and clearly made out, is sufficient to sustain a conviction of crime; but the circumstances must not be of a vague, indefinite, shadowy character, and the facts constituting the chain must be clearly defined. In cases depending upon circumstantial evidence, the mind seeks to explore every possible source from which any light, however feeble, may be derived; and it is peculiarly proper that the jury should have before them every fact and circumstance, however slight." ⁵

A charge need not be couched in any particular set words or phrases: if the ideas are sufficient and so expressed that the jury can readily comprehend the meaning of the language used, the demands of the law are satisfied.⁶

But a charge that "in order to convict on circumstantial evidence the circumstances must be so connected as to exclude every reasonable hypothesis but guilt of defendant," has been held not to be sufficiently full and specific to enable the jury to understand and apply the rules applicable to circumstantial evidence.

¹ *Wooldridge v. State*, 18 Tex. Crim. App. 448.

² *Cunningham v. State*, 20 Tex. Crim. App. 162. But see *Bishop v. State*, 48 Tex. 390, where it was said that the question of the failure of the court to charge the law of circumstantial evidence may properly be raised and availed of for the first time on motion for a new trial. See also *Montgomery v. State*, 18 Tex. Crim. App. 669.

³ *Brown v. State*, 28 Tex. 195; *Ross v. State*, 29 Id. 50; *Merritt v. State*, 2 Tex. Crim. App. 177; *McCleskey v. State*, 18 S. W. 997.

⁴ *Reynolds v. State*, 17 Tex. Crim. App. 418.

⁵ *McCleskey v. State*, *supra*.

⁶ *Rye v. State*, 8 Tex. Crim. App. 158.

⁷ *Bryant v. State*, 16 Tex. Crim. App. 144. And see *State v. Taylor*, 111 Mo. 588.

And a charge that to justify a conviction "the facts relied on must be absolutely incompatible with the defendant's innocence and incapable of explanation upon any other reasonable hypothesis than that of guilt," although abstractly correct as far as it goes, is erroneous in that it does not aid the jury in determining what weight should be given to, and upon what hypothesis they could be authorized to convict in view of such evidence.¹

The following charge was sustained: "In order to warrant a conviction of a crime on circumstantial evidence, each fact necessary to the conclusion sought to be established must be proven by competent evidence beyond a reasonable doubt. All the facts (that is, the facts necessary to the conclusion)² must be consistent with each other and with the main fact sought to be proved; and the circumstances, taken together, must be of a conclusive nature, leading on the whole to a satisfactory conclusion, and producing, in effect, a reasonable and moral certainty that defendant and no other person committed the offence charged, and unless the evidence does so you will acquit the defendant. But if the evidence does satisfy the understanding, reason, and conscience of the jury, and produces in their minds a reasonable and moral certainty of the guilt of the defendant beyond a reasonable doubt, and to the exclusion of every other reasonable hypothesis than that of guilt, then the jury should convict the defendant."³ The last sentence, however, is not usual.

The following cases will illustrate the application of the important rule which we have had under consideration:

In a case of burglary, articles stolen from the burglarized house were found, two or three weeks after the burglary, some in the defendant's possession, and some at a place which had been occupied by some one as a camping-place. The court thought it as reasonable to suppose that the defendant had taken the articles from the camping-place where the one who had burglarized the house had carried them.⁴

¹ *Williamson v. State*, 30 Tex. Crim. App. 330. And see *Bookser v. State*, 26 Tex. Crim. App. 593.

² *Gallaher v. State*, 28 Tex. Crim. App. 247.

³ *Rains v. State* (Ind.), 36 N. E. 532; *Kollock v. State* (Wis.), 60 N. W. 817; *Hocker v. State* (Tex. Crim. App.), 30 S. W. 873.

⁴ *Finlan v. State*, 13 S. W. 866.

In a case where the defendant was indicted for murder, the hypothesis of the defendant's guilt was supported by the following circumstances: 1. The defendant was the last person seen with the deceased on the night of the tragedy. 2. Deceased was heard to address a remark to the defendant on that night, at or near the place where the dead body of the former was found on the next morning. 3. Defendant was seen alone that night after the time when the deceased was supposed to have been killed, and appeared to be lost and drunk, and, as sworn by one witness, exhibited a reluctance to let himself be seen. 4. The dead body of deceased was found on the next morning with wounds upon it, and one mortal wound which had the appearance of having been inflicted with some sharp instrument. Defendant had a knife in his possession. 5. The dead body was found near where the deceased and defendant were last known to be together. 6. The defendant and deceased when last seen were on horseback. And when the dead body was found the tracks of two horses were found near it, and the riders appeared to have been engaged in a struggle. 7. The defendant, when asked where he had left the deceased, said: "I thought I left him over yonder, I might have left him along here; I was pretty drunk." 8. He had been heard to remark that "Money was the end of the law and he had it." 9. He had been heard to remark that he would not have his horse talk for \$1,000. The hypothesis of innocence was supported by the following circumstances: 1. Defendant and deceased were friends, and defendant had no motive for killing the deceased. 2. The fact that defendant was drunk might account for his otherwise singular conduct, and his want of knowledge as to where he left deceased. 3. From all that appeared, deceased might have killed himself. 4. Some other person might have come up with deceased and killed him after the defendant left him, for a witness testified that she heard a voice addressing the deceased near the place of killing and did not think it was the defendant's voice. 5. If defendant did kill deceased he might have been acting in self-defence, as deceased was armed with an iron rod, and there were evidences of a struggle. 6. Defendant had no blood-stains on his clothes. 7. He did not attempt to flee the country but attended the inquest next day. 8. He showed surprise when informed of the death of the deceased.

It was held that, taking all the testimony together, it did not come up to the standard of moral certainty, and did not exclude every reasonable hypothesis save that of guilt, and judgment was reversed.¹

It appeared on a trial for murder that the deceased had come to his death by a knife-stab in the throat. The defendant and another had been overheard asking the deceased for a loan of money. On the deceased's refusing the request the defendant had said: "I will lay your body down and have all your money by morning." Shortly after a witness saw the defendant in an out-of-the-way place, near to the spot where the body was afterwards found, opening a knife, and was asked by him in what direction the deceased had gone. A knife was exhibited, on which a physician testified that he had found dried blood, and another witness testified that the knife belonged to him, but that he had loaned it to the defendant shortly before the time of the murder, and that it had been brought back and put in his pocket while he was asleep. But several witnesses swore that they were with the defendant and the last witness when the knife was said to have been loaned, and that no such transaction took place. A conviction was had, but on appeal the judgment was reversed for insufficiency of the evidence.²

In a case already cited,³ the accused was charged with the larceny of a watch and chain. The complaining witness testified that he was standing in the rear platform of a crowded street car in which were also the accused and two others; that when the car stopped to let off a passenger, these three men pressed up against him so almost to press him over the rail, and that shortly after the three left the car together, and within half a minute thereafter the witness missed his watch. On this evidence the jury returned a verdict of guilty.

Where a woman was tried for having murdered her child, the following evidence developed at the trial was held sufficient to exclude every other reasonable hypothesis but that of guilt. The defendant was seen one day in an advanced state of pregnancy, and in a few days thereafter showed no signs of pregnancy. She denied, however, that she had given birth to a child. But there was no other woman in the neighborhood

¹ *Pogue v. State*, 12 Tex. Crim. App. 283.

² *Pullen v. State*, 28 Tex. Crim. App. 114.

³ *People v. Sands*, 5 N. Y. Cr. R. 261.

so far advanced in pregnancy. A great amount of blood was found on her bed-clothes and mattress, and she was shortly afterwards seen washing her clothes which were very bloody, and refused to say whose clothes they were ; she refused to give any explanation of these facts. The body of the child was found in a dry well within 25 or 30 yards of the defendant's house.¹

Where the evidence, wholly circumstantial, has weak places but is not absolutely insufficient, and upon which, reasoning fairly and impartially, different minds could arrive at opposite conclusions, and two juries have returned a verdict of guilty, the Supreme Court will not, on mere doubts, overturn the verdict.²

It follows as a consequence of this rule, that wherever several persons are jointly charged with any offence, joint complicity must be proved. In the case of the two Mannings their counsel severally endeavored to throw the guilt exclusively on the other ; and Lord C. B. Pollock told the jury that if they thought one of the prisoners was guilty, but could not possibly decide which was the guilty party, they might be reduced to the alternative of returning a verdict of not guilty as to both ; but, that if, looking at the whole transaction, they came to the conclusion that both must, according to the ordinary course of human affairs, have been concerned in the murder, it would be their duty to find both the prisoners guilty.³

A learned writer thinks that almost all writers have attempted to estimate the force of evidence upon a wrong principle ; that the true principle is to estimate its value entirely by the effect which it does in fact produce upon the minds of those who hear it, and that the value of evidence is measured exactly by the state of mind which it produces, as a force is measured by the weight which it will lift.⁴ But, not to dwell upon the fallacy of every attempt to compare the conclusion of moral reasoning with the constrained and inevitable consequence of mechanical force, this would be to give up a safe, practical, and philosophic test, the validity and sufficiency of

¹ Echols v. State, 81 Ga. 696.

² Monghan v. State, 59 Ga. 308.

³ Reg. v. Manning and wife, C. C. C., Oct. 1849.

⁴ See an able and interesting essay on the characteristics of English Law, Camb. Ess. 1857, p. 27.

which are recognized in every other branch of philosophical and scientific research, for an indeterminate and empirical result incapable of independent verification, and would virtually justify the most erroneous determinations of the tribunals.

With regard to the amount of proof which is required to establish the defence of *alibi* or the defence of insanity there has been much discussion, and the cases are not at all harmonious. Indeed, the distinction between the burden of proof and the *quantum* of proof does not seem to have been always clearly borne in mind.

In Iowa the defendant must prove a defence of *alibi* by a preponderance of evidence, because, as is said, the knowledge of the truth of it and the means of knowing it are peculiarly with him.¹

And an instruction proceeding on the theory that the established fact of an *alibi* (if it were established) would be a fact to be considered in connection with other facts and circumstances is improper.² But where the court has instructed generally as to reasonable doubt, no special instruction need be given as to *alibi*.³

Preponderance of evidence, says the Supreme Court of South Carolina, is the lowest degree capable of producing conviction. Less cannot be required of one whose duty it is to establish a particular fact, subject, of course, to the general rule that a party charged with crime is entitled to the benefit of all reasonable doubts.⁴

In *Webster's* case⁵ the defence attempted to show that on the day after the murder was alleged to have been committed the deceased was seen alive on a street of his native city. If this could have been clearly made out the defendant would, of course, have been entitled to an acquittal. Concerning this matter the charge of Chief Justice Shaw was as follows: "We now come to consider that ground of defence on the part of the defendant which has been denominated, not, perhaps, with precise legal accuracy, an *alibi*, that is, that the deceased was seen elsewhere out of the medical college after

¹ *State v. Beasley*, 84 Ia. 88; *State v. Hamilton*, 57 Ia. 596; *State v. Keedson*, 57 Ia. 588; *State v. Northrup*, 48 Ia. 583; *State v. Kline*, 54 Ia. 183; *State v. Red*, 53 Ia. 69; *State v. Haddin*, 46 Ia. 623.

² *State v. McCracken*, 66 Ia. 569.

³ *State v. Sutton*, 70 Ia. 208.

⁴ *State v. Nance*, 25 S. C. 168; *State v. Paulk*, 18 S. C. 514.

⁵ 5 Cush. 296.

the time when, by the theory of proof on the part of the prosecution, he is supposed to have lost his life at the medical college. It is like the case of an *alibi* in this respect, that it proposes to prove a fact which is repugnant to, and inconsistent with, the facts constituting the evidence on the other side, so as to control the conclusion, or at least render it doubtful, and thus lay the ground of an acquittal. And the court are of opinion that this proof is material; for although the time alleged in the indictment is not material, and an act done at another time would sustain it, yet in point of evidence it may become material; and in the present case, as all the circumstances shown on the other side, and relied upon as proof, tend to the conclusion that Dr. Parkman was last seen entering the medical college and that he lost his life therein, if at all, the fact of his being seen elsewhere afterwards would be so inconsistent with that allegation, that, if made out by satisfactory proof, we think it would be conclusive in favor of the defendant. Both are affirmative facts, and the jury are to decide upon the weight of evidence. When you are called upon to consider the proof of any particular fact, you will consider the evidence which sustains it, in connection with that which makes the other way, and be governed by the weight of the proof. Proof which would be quite sufficient to sustain a proposition, if it stood alone, may be encountered by such a mass of opposite proof as to be quite overbalanced by it. In the ordinary case of an *alibi*, when a party charged with crime attempts to prove that he was in another place at the time, all the evidence tending to prove that he committed the offence tends in the same degree to prove that he was at the place when it was committed. If, therefore, the proof of the *alibi* does not outweigh the proof that he was at the place when the offence was committed, it is sufficient."

It has been recently said¹ that the weight of authority is settled that where an *alibi* is relied upon as a defence the burden of proof rests upon the defendant to establish it to the satisfaction of the jury. But the instruction sustained told the jury that "if they believed that the evidence clearly sustained the defence, or if it raised in their minds a reasonable doubt as to the guilt of the defendant, they must acquit him." It may be remarked that proving to the satisfaction of the jury

¹ By the Supreme Court of New Mexico, in *Terr. v. Trujillo*, 32 Pac. 154.

that the defendant was elsewhere at the time of the commission of the crime is not the same thing as raising in their minds a reasonable doubt of his guilt.

The rule in Georgia is formulated by the Supreme Court of that State in a head-note to the case of *Harrison v. State*, and is said to consist of two branches: First, that to overcome proof of guilt strong enough to exclude all reasonable doubt, the *onus* is on the accused to verify his alleged *alibi*, to the reasonable satisfaction of the jury; second, that, nevertheless, any evidence whatever of *alibi* is to be considered in the general case with the rest of the testimony, and if a reasonable doubt of guilt be raised by the evidence as a whole the doubt must be given in favor of innocence.¹

If the defendant fails to prove it to the satisfaction of the jury, the alleged *alibi* as a substantive defence is valueless; but that does not deprive him of the benefit of his evidence on the subject so far as it, in connection with other testimony in the case, may have a tendency to create a reasonable doubt as to his guilt.²

Whatever tends to support one theory, tends in the same degree to rebut and overthrow the other, and it is for the jury to decide which is the truth.³ And the prevailing view seems to be that proof of an *alibi* is, as it were, a traverse of the crime charged, and that proof tending to establish it, though insufficient of itself to establish that fact, is not to be excluded from the case. If its weight, alone, or added to that of other evidence in the case, be sufficient to reduce belief in the minds of the jury as to the defendant's guilt, to a reasonable doubt, they should acquit.⁴ If the defendant's evidence is sufficient to raise a reasonable doubt, or if the State's evidence is so defective as to cause a reasonable doubt, or if, taking all the evidence on both sides, there is a reasonable doubt of the defendant's guilt, there must be an acquittal.⁵

¹ 83 Ga. 129. And see *Duncan v. State* (Ga.), 23 S. E. 324.

² *Rudy v. Com.*, 128 Pa. St. 500. And see *Turner v. Com.*, 86 Pa. St. 54; *Briceland v. Com.*, 74 Pa. St. 468.

³ *State v. Ward*, 61 Vt. 158.

⁴ *People v. Fong Ah Sing*, 64 Cal. 258; *State v. Howell*, 100 Mo. 624; overruling *State v. Jennings*, 81 Mo. 185; *Pate v. State*, 94 Ala. 14; *State v. Waterman*, 1 Nev. 543; *Wisdom v. People*, 11 Col. 170; *Adams v. State*, 28 Fla. 511; *McLain v. State*, 18 Neb. 154.

⁵ *State v. Woolard*, 111 Mo. 248. And see *Gallaher v. State*, 20 Tex.

There is a presumption—so runs the reasoning in the case—that clings to a person charged with crime through every successive step of his trial, that he is innocent; and this presumption is never weakened, relaxed, or destroyed until there is a judgment of conviction. All that the defendant is required to do is to show such a state of facts as to create a reasonable doubt of guilt.¹ And it is therefore not correct to instruct that the evidence must be such as to satisfy the jury that the crime could not have been committed by the defendant.²

The Supreme Court of Michigan reversed a judgment upon the ground that in an instruction to the jury a burden was cast upon the defendant much heavier than the law would justify. The trial court had charged that proof of an *alibi* “must cover the time that the offence is shown to have been committed, so as to preclude the possibility of the prisoner’s presence at the place of the burglary,” and that “the value of the defence consists in his showing that he was absent from the place where the deed was done, and at the very time that the evidence of the people tends to fix its commission upon him. If it be possible that he could have been at the places, the defence is valueless.” No such strict proof, it was said, is required.³

Where the jury were told that they must acquit unless they found from all the circumstances given in evidence the presence of the defendant at the place of the crime, and his guilt beyond a reasonable doubt, a special instruction concerning the defence of *alibi* was held unnecessary.⁴

Where the jury were instructed that “if they should find and believe from the evidence that, at the time the offence charged in the indictment was committed, the defendant was at a place other than the place where such offence or crime was committed, they should find the defendant not guilty.” This was held, on appeal, to be erroneous, because, while the jury might have had no hesitancy in refusing to find as an affirmative fact that defendant was in the place where he claimed he was when the crime was committed, yet they might have entertained a reasonable doubt on the subject.⁵

Crim. App. 247; *People v. Stone*, 7 N. Y. Cr. R. 430; *Miller v. People*, 89 Ill. 457.

¹ *State v. Child*, 40 Kan. 482.

² *Murphy v. State*, 31 Fla. 166.

³ *Stuart v. People*, 42 Mich. 255. See also *Sullivan v. People*, 31 Mich. 1.

⁴ *State v. Sanders*, 106 Mo. 188. And see *State v. Shroyer*, 104 Mo. 441.

⁵ *State v. Taylor* (Mo.), 22 S. W. 806. And see *State v. McLain*, *supra*.

Under no state of facts could a charge upon *alibi* be correct which required the jury to believe the proof of *alibi* before they could acquit.¹ But if, after considering all the facts and circumstances, the jury have no reasonable doubt of the presence of the defendant at the place of the crime, the defence has not been made out.² And the verdict will not be set aside because the jury have given credence to the evidence of the prosecution contradicting the evidence in support of the *alibi*.³

It was formerly held in one or two States that where the defence of insanity was set up the jury ought to be satisfied of the insanity beyond a reasonable doubt.⁴ This view never obtained much support, and is, at the present time, almost universally discountenanced.⁵

Says Foster in his Crown Law: "All the circumstances of accident, necessity, or infirmity are satisfactorily to be proved by the prisoner."⁶ And Chief Justice Tindal, speaking for all the judges with the exception of Mr. Justice Maule, said, in answer to a question propounded by the House of Lords in consequence of a discussion which arose out of the famous *M'Naughton* case,⁷ that "the jury ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved to their satisfaction." And it is a widely adopted rule in this country that the defendant must prove to the reasonable satisfaction of the jury that he was insane at the time of the commission of the act.⁸ A reasonable doubt of the defendant's sanity raised by all the evidence does not authorize an acquittal.⁹

¹ *Bennett v. State*, 30 Tex. Cr. App. 841.

² *Aneals v. People*, 134 Ill. 401; *Gravely v. State*, 88 Neb. 871.

³ *Doyle v. State*, 5 Tex. Crim. App. 442.

⁴ *State v. Spencer*, 1 Zab. 197.

⁵ *Meyers v. Com.*, 83 Pa. St. 131; *Dove v. State*, 3 Heisk. 848; *People v. McCann*, 16 N. Y. 85; *Patterson v. People*, 46 Barb. 625. And opinion of EARL, C. J., in *People v. Schryver*, 42 N. Y. 1.

⁶ App. 255. ⁷ See 8 Scott's N. R. 595; 1 C. & K. (12 E. C. L.) 130.

⁸ *State v. Schæfer*, 116 Mo. 96; *State v. Klinger*, 43 Mo. 127; *State v. King*, 1 Mo. App. 438; *Loeffner v. State*, 10 Ohio St. 59; *Fisher v. People*, 23 Ill. 283.

⁹ *Ford v. State*, 71 Ala. 385; *Boswell's Case*, 63 Ala. 307. And see further on this subject, *Walter v. People*, 82 N. Y. 147; *Graham v. Com.*, 16 B. Mon. 587; *Chase v. People*, 40 Ill. 352; *State v. Lawrence*, 57 Maine, 574; *Kriel v. Com.*, 5 Bush, 362; *Bonsall v. Com.*, 20 Grat. 860; *People v. Coffman*, 24 Cal. 230; *State v. Bartlett*, 43 N. H. 224; *McKenzie v. State*, 42

The more modern doctrine, however, is that although the law presumes sanity, it at the same time presumes innocence, that these presumptions are each disputable and must go to the jury to be considered by them in connection with the other evidence, and that if the jury, upon the facts of the whole case, entertain a reasonable doubt that the crime charged was committed by the prisoner while in a sane state of mind, he is entitled to an acquittal.¹ If upon the whole evidence the jury have a reasonable doubt of defendant's sanity, they have a reasonable doubt of his guilt, and are bound to acquit.²

This view is adopted in Indiana, where the following commendable instruction was approved in a valuable case :³ "The law presumes that a man is of sound mind until there is some evidence to the contrary. In prosecutions for offences against the criminal code, the accused is entitled to an acquittal if the evidence engenders a reasonable doubt as to his mental capacity at the time the alleged offence is charged to have been committed. Evidence rebutting, or tending to rebut, the presumption of sanity, need not, to entitle the defendant to an acquittal, preponderate in favor of the accused. It will be sufficient if it raise in the minds of the jury a reasonable doubt." And in a recent case in Illinois the law was thus laid down : "The presumption of sanity inheres at every stage of the trial until the insanity is made to appear by the evidence. The law in this State undoubtedly is that this legal presumption may be overcome by evidence tending to prove insanity of the accused, which is sufficient to raise a reasonable doubt of his sanity at the time of the commission of the act for which he is sought to be held accountable. When that is done the presumption of sanity ceases, and the burden shifts to the prosecution, and it is then required to prove his sanity, as an element necessary to constitute crime, beyond a reasonable doubt."⁴

Ga. 334 ; *State v. Robinson*, 20 W. Va. 727 ; *State v. Manchester*, 46 Ia. 88 ; *State v. Bruce*, 48 Ia. 533 ; *Lynch v. Com.*, 77 Pa. St. 205 ; *Ortwein v. Com.*, 76 Pa. St. 414.

¹ See the remarks of Judge Somerville in *Ford v. State*, 71 Ala. 385, where it was intimated that if the question were a new one in Alabama it would be decided in accordance with the later doctrine.

² *State v. Crawford*, 11 Kan. 32. See further *State v. Keddict*, 7 Kan. 143 ; *Pomeroy's Case*, 117 Mass. 143.

³ *Grielig v. People*, 66 Ind. 94.

⁴ *Dacey v. People*, 116 Ill. 556. And see *Jamison v. People*, 145 Ill. 357 ;

The same view is held by the Supreme Court of Kansas, as is manifested by the following instruction: "The jury should be satisfied beyond a reasonable doubt, before convicting a man of a crime, that he was of sound mind at the time of the commission of the offence. If not so satisfied beyond a reasonable doubt he should be acquitted. The jury are further instructed that if, upon the whole evidence, they find that the defendant at the time of committing the act was not of sound mind, and was unconscious that he was committing a crime, they should acquit him. The fact of the soundness of mind at the time when the act was committed is as much an essential ingredient of the crime of murder, as the fact of killing or of malice, or of any other fact or ingredient of murder, and should be made out in the same way, by the same party, and by evidence of the same kind and degree, and as conclusive in its character as is required in making out any other fact, ingredient, or element of murder. * * * If the jury cannot say beyond a reasonable doubt that the defendant was sane at the time of the commission of the alleged act, or cannot say whether, at the time, he was sane or insane, they are bound to acquit him."¹

SECTION II.

If the Evidence Fails to Attain the Required Standard an Acquittal must Follow.

If there be any reasonable doubt of the guilt of the accused, he is entitled, as of right, to be acquitted. In other words, there must be no uncertainty as to the reality of the connection of the circumstances of evidence with the *factum probandum*, or as to the sufficiency of the proof of the *corpus delicti*, or, supposing those points to be satisfactorily established, as to the personal complicity of the accused.

This might, perhaps, be classed as a fifth rule, but in strictness it is hardly so much a distinct rule of evidence as a consequence naturally flowing from, and virtually comprehended

Faulkner v. Terr. (N. M.), 30 Pac. 905; Cunningham v. State, 56 Miss. 269.

¹ State v. Mahn, 25 Kan. 186.

See on this subject the valuable treatise of Judge Seymour D. Thompson on the Law of Trials, § 2524 *et seq.*

in, the preceding rules. Indeed, it is more properly a test of the right application of those rules to the facts of the particular case. The necessity and value of such test is manifest from the consideration of the numerous fallacies incidental to the formation of the judgment on indirect evidence and contingent probabilities, and from the impossibility in all cases of drawing the line between moral certainty and doubt.

In questions of civil right the decision must be given according to the greatest amount of probability in favor of one or the other of the litigant parties;¹ but where life or liberty are in the balance, it is neither just nor necessary that the accused should be convicted but upon conclusive evidence. While it is certain that circumstantial evidence is frequently most convincing and satisfactory, it must never be forgotten, as was remarked by that wise and upright magistrate, Sir Matthew Hale, that "persons really innocent may be entangled under such presumptions, that many times carry great probabilities of guilt;"² wherefore, as he justly concludes, "this kind of evidence must be very warily pressed."

Many adverse appearances may be outweighed by a single favorable one, and all the probabilities of the case may not be before the court. The Lord Justice Clerk Cockburn, in his charge in the case of *Madeleine Smith*, before mentioned, said: "I wish you to keep in mind that although you may not be satisfied with any of the theories that have been propounded on behalf of the prisoner, still, nevertheless, the case for the prosecution may be radically defective in evidence."³ But in

¹ In civil cases it is sufficient if the evidence on the whole agrees with and supports the hypothesis which it is adduced to prove. *EARL*, C. J., in *People v. Schryver*, 42 N. Y. 1; *James v. State*, 45 Miss. 572. In all civil cases the preponderance of testimony is considered sufficient to produce mental conviction. Ga. Code, § 3749. And the court should not lay stress upon doubt which may exist of the proof of particular facts. *Clark v. Cassidy*, 62 Ga. 407. See also *Gannon v. Ruffin*, 151 Mass. 204; *Com. v. Cullen*, 36 Leg. Int. 252; *Jones v. Greaves*, 26 Ohio St. 2; *Rippey v. Miller*, 1 Jones' L. 479; *Neal v. Tesperman*, 1 Id. 446; *Ætna Ins. Co. v. Johnson*, 11 Bush, 587; *Barfield v. Britt*, 2 Jones' L. 41; *People v. Evening News*, 51 Mich. 11; *Newis v. Look*, Plowd. 412; remarks of Mr. Justice WILLES, in *Cooper v. Slade*, 6 E. & B. 447; 6 H. L. 746.

In a civil case an instruction has been held erroneous which required a party to establish his claim by a "clear preponderance of evidence." *Bitter v. Saathoff*, 98 Ill. 266.

² 2 P. C. 89. See also *Rex v. Thornton*, *supra*; *Prather v. Com.*, 10 Crim. L. Mag. 890.

³ See *infra*, 401 *et seq.*

Kentucky, where the court is confined to instructing the jury on the "law applicable to the case," it is held that circumstantial evidence should be left like direct evidence to be considered by the jury, and to have such weight as they deem it entitled to without caution or suggestion on the part of the court to scrutinize it closely.¹

It is safer, therefore, as was wisely said by Sir Matthew Hale, to err in acquitting than in convicting, and better that many guilty persons should escape, than that one innocent man should suffer.² Paley controverts the maxim, and urges that "he who falls by a mistaken sentence may be considered as falling for his country, while he suffers under the operation of those rules by the general effect and tendency of which the welfare of the community is maintained and upheld."³ There is no judicial enormity which may not be palliated or justified under color of this execrable doctrine, which is calculated to confound all moral and legal distinctions; its sophistry, absurdity, and injustice have been unanswerably exposed by one of the ablest of lawyers and most upright of men.⁴ Justice never requires the sacrifice of a victim; an erroneous sentence is calculated to produce incalculable and irreparable mischief to individuals, to destroy all confidence in the justice and integrity of the tribunals, and to introduce an alarming train of social evils as the inevitable result.

In *Belaney's* case Mr. Baron Gurney, one of the ablest and most experienced judges of the English criminal courts, in his summing up used this language: "If you think the case is conclusive, it is your duty to pronounce the prisoner guilty. But if you think it has left you in doubt so that you cannot safely convict, you will remember that it is better that many guilty men should escape than that one innocent man should perish." And again: "If you convict while there is any rational doubt, you act in defiance of a well-known rule of law, and may commit that foulest of all enormities, a murder under color of law; whereas, if you err in an acquittal, the worst that can be said is, that human justice has miscarried—at least it has not committed a crime. In the one case a

¹ *Brady v. Com.*, 11 Bush, 282.

² 2 P. C. c. 89.

³ *Mor. and Pol. Phil.* b. vi. ch. 9.

⁴ *Romily's Obs. on the C. L. of England*, 72; *Best on Pres.* 292.

murder merely passes for the present unpunished: in the other the most horrible of murders is committed."

Every consideration of truth, justice, and prudence requires, therefore, that where the guilt of the accused is not incontrovertibly established, however suspicious his conduct may have been, he shall be acquitted of legal accountability. The accused is entitled to an acquittal unless the fact of guilt is proven to the exclusion of every reasonable hypothesis of innocence.¹

No rule of procedure is more firmly established, as one of the great safeguards of truth and innocence, than the rule in question; and it is the invariable practice of judges to advise juries to acquit whenever they entertain any fair and reasonable doubt.² But a charge that, no matter how strong the circumstances might be, the jury should acquit if, under all the evidence, they believe that the accused might not have committed the crime, imposes too strong a measure of proof on the prosecution.³ And to instruct that there must be an acquittal if "any uncertainty whatever exists," calls for too high a measure of proof.⁴

A probability of a defendant's innocence is a just foundation for a reasonable doubt of his guilt, and therefore for his acquittal.⁵

And after having thus charged the jury it is proper for the court to add that "probability is the state of being probable; and 'probable' has been defined to be 'more evidence for than against; supported by evidence which inclines the mind to belief, but leaves some room for doubt.'"⁶

Where the defendant requested the following instruction: "It is as much their duty as jurors to acquit the defendant, if from the evidence they have a reasonable doubt of his guilt, as it would be to convict him if they believe to a moral certainty

¹ *Prather v. Com.*, 10 Crim. L. Mag. 890.

² *State v. Bush*, 122 Ind. 42; *People v. O'Bryan*, 1 Wheel. Cr. Cas. 21; *People v. Blake*, Id. 272; *Joe v. State*, 38 Ala. 422; *Shultz v. State*, 13 Tex. 401; *Bradley v. State*, 81 Ind. 492; *Connor v. State*, 34 Tex. 659; *James v. State*, 45 Miss. 572; *Lowder v. Com.*, 8 Bush, 432; *McGregor v. State*, 16 Ind. 9; *Reins v. People*, 30 Ill. 256; *State v. Crawford*, 34 Mo. 200; *McGuire v. State*, 37 Miss. 269; *Crilly v. State*, 20 Wis. 231; *Com. v. Cunningham*, 104 Mass. 545.

³ *Pate v. State*, 94 Ala. 14.

⁴ *Yarbrough v. State* (Ala.), 16 So. 758.

⁵ *Dain v. State*, 74 Ala. 38.

⁶ *Williams v. State*, 96 Ala. 22.

that he is guilty ; and if from the evidence they are not satisfied beyond a reasonable doubt that he is guilty, they would be false to their obligations as jurors if they were to convict him, as they would be should they acquit him if the evidence convinces them of his guilt to a moral certainty"—this was properly refused as being argumentative, and having a tendency rather to confuse than to enlighten."¹

The inherent imperfection of language renders it impossible to define in exact, express terms the nature of a reasonable doubt. It arises from a mental operation, and exists in the mind when the judgment is not fully satisfied as to the truth of a criminal charge, or the occurrence of a particular event, or the existence of a thing. It is a matter that must be determined by a jury, acting under the obligations of their oaths and their sense of right and duty.² And some courts hold it to be the better practice not to attempt to define a reasonable doubt,³ declaring that it is not susceptible of a clearer definition than is expressed in the phrase itself,⁴ and that attempts to define it are unsafe and indiscreet, and, more often than otherwise, confusing to the jury. And certainly where the term is defined by statute, it would be well for a judge at the trial to follow the exact language of the statute without attempting further explanation.

It is not error to omit to define the phrase when no instruction containing the definition is asked ;⁵ and an instruction to the jury that they should be satisfied of the defendant's guilt beyond a reasonable doubt is often sufficient without further explanation. But in many instances, and especially where the case is at all complicated, some explanation or illustration of the rule may aid in its full and just comprehension.⁶

The law does not require that the testimony should be such as to exclude every possible doubt or every imaginary theory except that of the defendant's guilt.⁷ A probability of inno-

¹ *Cooper v. State*, 88 Ala. 107.

² *DICK, J.*, in *U. S. v. Hopkins*, 26 Fed. Rep. 443.

³ *Terr. v. Chavely*, 30 Pac. 908 ; *Mickey v. Com.*, 9 Bush, 593 ; *Williams v. Com.*, 80 Ky. 813.

⁴ *Siberry v. State*, 183 Ind. 677 ; *Wall v. State*, 51 Ind. 453.

⁵ *People v. Christensen*, 85 Cal. 588 ; *State v. Robinson*, 117 Mo. 649.

⁶ *Mr. Justice FIELD*, in *Hopt v. Utah*, 120 U. S. 430.

⁷ *State v. Ford*, 21 Wis. 610.

cence is not a reasonable doubt.¹ The ambiguous sentence, "mere probabilities of innocence or doubts, however reasonable, which beset some minds on all occasions, should not prevent a verdict of guilty," should not be employed in charging the jury upon this subject. But though disapproved, it will not, when used, cause a reversal if the charge is, in other respects, strong and clear.²

A reasonable doubt is not a doubt created by the ingenuity of counsel,³ or of the jury.⁴ And it is not a whimsical,⁵ arbitrary,⁶ or speculative⁷ doubt; neither is it a trivial supposition.⁸ It is not a conjecture or a guess.⁹ Nor is it such a doubt as is born of a merciful inclination to permit the defendant to escape the penalty of the law, nor one prompted by sympathy for him or those dependent upon him.¹⁰ The jury must not raise a fanciful or ingenious doubt to escape the consequences of an unpleasant verdict.¹¹

In a Missouri case¹² it was held that a charge directing the jury that they might "act upon that degree of assurance such as prudent men properly act upon in the more important concerns of life," was correct when considered with other portions of the instruction. Whether a doubt is reasonable or not is never an absolute but always a relative question.¹³ And it has been said that an illustration by reference to the conviction upon which the jurors would act in the weighty and important concerns of life would be likely to aid them to a right conclusion.¹⁴

¹ *Reeves v. State*, 29 Fla. 527.

² *People v. Lee Save Co.*, 72 Cal. 623.

³ *U. S. v. King*, 2 Wash. L. Rep. 501.

⁴ *U. S. v. Harper*, 33 Fed. Rep. 471.

⁵ *McGuire v. State*, 43 Tex. 210; *Welsh v. State*, 96 Ala. 92.

⁶ *McGuire v. People*, 44 Mich. 286.

⁷ *Brown v. State*, 1 Tex. App. 154; *Boulden v. State*, 102 Ala. 78.

⁸ *Giles v. State*, 6 Ga. 276. And see the language of Mr. Baron PARKE, in *Reg. v. Tawell*, *ut supra*.

⁹ *People v. Davis*, 19 N. Y. S. 781; *Welsh v. State*, 11 So. 450.

¹⁰ *Watt v. People*, 1 L. R. A. 403; 126 Ill. 9; *United States v. Means*, 42 Fed. Rep. 599; *Perry v. State*, 87 Ala. 30; *Dick v. State*, Id. 61; *Vann v. State*, 38 Ga. 44; *State v. Clayton*, 100 Mo. 516; *U. S. v. Harper*, *ut supra*.

¹¹ *Com. v. Drum*, 58 Pa. St. 9. ¹² *State v. Crawford*, 34 Mo. 201.

¹³ *Leonard v. Terr.*, 2 Wash. L. 381.

¹⁴ *Mr. Justice FIELD*, in *Hopt v. Utah*, 120 U. S. 430. And see *State v. Nash*, 7 Iowa, 347; *State v. Ostrander*, 18 Iowa, 458; *Arnold v. State*, 23 Ind. 170; *United States v. Heath*, 19 Wash. L. Rep. 818; *State v. Kearley*, 26 Kan. 77.

"If," said Lord Chief Baron Pollock to a jury, "the conclusion to which you are conducted be that there is that degree of certainty in the case that you would act upon it in your own grave and important concerns, that is the degree of certainty which the law requires, and which will justify you in returning a verdict of guilty."¹ "To require more," said the same high authority on another occasion, "would be really to prevent the repression of crime which it is the object of criminal courts to effect."²

For a trial juror, said the court in a recent case, it is such a doubt as a man of ordinary prudence, sensibility, and decision, in determining an issue of like concern to himself as that before the jury to the defendant, would allow to have any influence whatever upon him or make him pause or hesitate in arriving at his determination.³

The Court of Appeals of New York lately approved an instruction which substantially charged that a reasonable doubt could not be said to exist where the jury were so firmly convinced of the facts necessary to establish the prisoner's guilt, that, if it were a grave and serious matter, affecting their own affairs, they would not hesitate to act upon such conviction.⁴

A doubt that would cause one to pause and hesitate, if fairly derived from the evidence, is a reasonable doubt within the meaning of the criminal law. "A doubt that would control our actions in the important transactions of life would be one that was so strong as not to be overcome by the balancing process. Such doubt would be practically an unconquerable one. It would lead us not simply to refrain from acting, but to act."⁵

But it is maintained by other courts that the degree of certainty upon which men act in "their own grave and important concerns," will not justify a verdict of guilty in a criminal case. The jury, it is said, should be fully convinced of the correctness of their conclusion that the prisoner is guilty.⁶

¹ *Reg. v. Manning and Wife*, C. C. C., Oct. 1849. And see the language of Mr. Justice PARKE, in *Doe d. Pattershall v. Turford*, 3 B. & Ad. 897; and of Lord MEADOWBANK, in *Reg. v. Humphreys*, Swinton's Rep. 858. And see *McGregor v. State*, 16 Ind. 9.

² *Muller's Case*, C. C. C., Jan. 1865. ³ *Leonard v. Terr.*, 2 Wash. T. 381.

⁴ *People v. Wayman*, 128 N. Y. 585; *People v. Hughes*, 32 N. E. 1105. And see also *State v. Elsham*, 70 Ia. 531; *Butter v. State* (Ga.), 19 S. E. 51.

⁵ *Com. v. Miller*, 189 Pa. 77.

⁶ *Jane v. Com.*, 2 Met. (Ky.) 80, 85; *Palmerston v. Terr.* 3 Wyo. 83;

The Supreme Court of Minnesota reversed a judgment because of error in an instruction which charged "that in order to convict, the jury must be satisfied beyond a reasonable doubt that this does not require unreasonable or impracticable things at the hands of the prosecution, nor absolute certainty; but the jury should be satisfied as reasonable men, so that they would be willing to act upon it as in matters of great importance to themselves." In the course of the argument on this point the court said: "The limitations of the charge are substantially that unreasonable and impracticable things are not required of the prosecution, nor need the proof amount to absolute certainty; on the other hand, it must not be a mere preponderance of evidence. But within these limits any degree of proof upon which, as reasonable men, they would act in matters of great importance to themselves would be sufficient. Men may and do act in matters of great importance to themselves upon strong probabilities and without that degree of proof which convinces the mind and conscience. But it would be unreasonable of men, in matters of the highest concern and importance to them, to act without a conviction of the truth of the evidence and correctness of the result upon which they base their action. Under this charge the preponderance of proof might be so great as to produce a strong probability of the defendant's guilt, such a probability as men would act upon in matters of great importance, and yet not convince the minds and consciences of the jury beyond a reasonable doubt of the guilt of the defendant."¹

People v. Marble, 30 Mich. 309; *People v. Bemmerly*, 87 Cal. 117; *State v. Oscar*, 52 N. C. 305; *People v. Wohlfrom* (Cal.), Feb. 17, 1891; *Cohen v. State*, 50 Ala. 108; *Terr. v. Bannigan*, 1 Dak. 451; *State v. Rover*, 11 Nev. 343; overruling *State v. Millain*, 3 Nev. 481. Where the court instructed that "if the same quantity and quality of evidence offered here was offered to a reasonably careful business man as to his important business transactions, and it would induce him to act on his important business matters, there cannot be said to be a reasonable doubt," the judgment was reversed. *State v. Shettleworth*, 18 Minn. 208. See also *People v. Ashe*, 44 Cal. 288; *Bray v. State*, 41 Tex. 560. In a Wisconsin case the jury were instructed that they should require equally as strong and conclusive evidence of guilt as the jury would require to induce them to enter upon the greatest and most important acts of their lives, always remembering that their verdict must be the truth. And though the judgment was not reversed the charge was declared not wholly satisfactory. *Ryan v. State*, 63 N. W. 836; 83 Wis. 483.

¹ *State v. Dineen*, 10 Minn. 416. Similar to this was the language of the

In an early case in Pennsylvania Chief Justice Gibson said that a juror was "not at liberty to disbelieve as a juror while he believed as a man." ¹ And recently Mr. Justice Paxson said that this language was entirely proper when considered in connection with the facts of the particular case.²

In a subsequent case it was held that similar language, though liable to be misunderstood by the jury, was not erroneous as a matter of law.³ But Mr. Justice Parson thought that even this required some qualification. "If it does mislead the jury, or is so used that it is likely to mislead the jury," it would, said that learned judge, be regarded as error. "There are many cases in which jurors, as men, may believe a person on trial for a crime to be guilty, where the evidence in the case would not warrant a conviction."

But the following language in the charge, used in connection with the evidence of the particular case, was held proper: "This reasonable doubt is not one the jury will reach out for to relieve them from finding a verdict of guilty, but such a doubt as is left from the failure of the evidence to convince your minds of the guilt of the defendant. You should be convinced as jurors where you would be convinced as citizens, and you should doubt as jurors only where you would doubt as men."⁴

In Illinois it has been ruled that a juror may be instructed that his oath imposes no obligation to doubt where no doubt would exist if no oath had been administered.⁵ But in Indiana

court in *Bradley v. State*, 31 Ind. 491. "A prudent man compelled to do one of two things affecting matters of the utmost moment to himself might, and doubtless would, do that thing which a mere preponderance of evidence satisfied him was for the best, and yet such a condition would fall far short of that required to satisfy the mind of a juror in a criminal case. It must induce such faith in the truth of the facts which the evidence tends to establish that a prudent man might without distrust voluntarily act upon their assumed existence in matters of the highest import to himself." And the conclusion of the court in this case was that there should be added to Mr. Starkie's definition the qualification that there should be such a conviction of the truth of the proposition that a prudent man would be safe to act upon the conviction under circumstances where there was no compulsion resting upon him to act at all. See also *Jarrell v. State*, 58 Ind. 293; *State v. Potts*, 20 Nev. 398.

¹ *Com. v. Harman*, 4 Pa. 273.

² In *McMeen v. Com.*, 5 Cent. Rep. 887; 114 Pa. St. 300.

³ *Fife v. Com.*, 29 Pa. St. 429.

⁴ *McMeen v. Com.*, *supra*.

⁵ *Watt v. People*, 126 Ill. 9; 1 L. R. A. 403.

such an instruction has been declared improper, since it, in effect, relieves the jury from the obligation of their oaths.¹

By belief beyond a reasonable doubt is not meant absolute certainty beyond all doubt, nor a mere possibility of innocence.² The Missouri Court of Appeals has held it improper to use the phrase "real, substantial doubt."³ But it may be said, on the sanction of authority, that the doubt that will justify acquittal, is not a probable doubt of defendant's guilt,⁴ not an artificial and forced one,⁵ not a "reasonable possibility" of innocence,⁶ not mere possibility or speculation;⁷ but a real, substantial, well-founded doubt,⁸ and such a one as would be entertained by a reasonable and conscientious man.⁹ The Supreme Court of Louisiana gave its unqualified approval to a charge which declared that this doubt was "not a mere possible doubt; it should be an actual or substantial doubt, and such a doubt as a reasonable man would seriously entertain."¹⁰ The term refers to the strength of the belief, and a charge that the jury must convict if they "conscientiously believe the defendant guilty on the evidence," is erroneous, since this touches the *sincerity* of the belief.¹¹ And so it has been said

¹ *Siberry v. State*, 183 Ind. 627. To the same effect, see *People v. Johnson*, 140 N. Y. 350.

² *State v. Turner*, 110 Mo. 196; *Langford v. State*, 32 Neb. 788; *State v. Jefferson*, 43 La. Ann. 995; *State v. Talmage*, 107 Mo. 543; *U. S. v. Hughes*, 34 Fed. Rep. 732; *People v. Cox*, 70 Mich. 247.

³ *State v. Fitzgerald*, 20 Mo. App. 408. A charge that reasonable doubt means a reasonable, substantial, real doubt, touching the defendant's guilt, and not a mere guess, conjecture, or mere possibility that defendant may be innocent, is incorrect. *State v. Smith*, 4 West. Rep. 788; 21 Mo. App. 595.

⁴ *Prince v. State (Ala.)*, 14 So. 409.

⁵ *State v. Bodekee*, 34 Ia. 520.

⁶ *Sims v. State (Ala.)*, 14 So. 560.

⁷ *Whart. Crim. Law*, § 707; *State v. Evans*, 55 Mo. 460; *Boulden v. State* 102 Ala. 78; *Winter v. State*, 20 Ala. 89; *United States v. Foulke*, 6 McLean, 349; *Billard v. State*, 80 Tex. 367; *Langford v. State*, 32 Neb. 783; *Owens v. State*, 52 Ala. 400; *Clark v. Com.*, 123 Pa. 555; *Com. v. Harman*, 4 Pa. 269, 274.

⁸ *State v. Nueslein*, 25 Mo. 111; *State v. Shæffer*, 5 West. Rep. 465; 89 Mo. 271; *State v. Heed*, 57 Mo. 252; *State v. Leeper*, 78 Mo. 470; *State v. Blunt*, 10 West. Rep. 49; 91 Mo. 503; *State v. Payton*, 7 West. Rep. 129; 90 Mo. 220.

⁹ *State v. Rounds*, 76 Me. 123. And see *Willis v. State (Neb.)*, 61 N. W. 254.

¹⁰ *State v. Jefferson*, 43 La. Ann. 995. And see *Boulden v. State (Ala.)*, 15 So. 341.

¹¹ *Burt v. State (Miss.)*, 16 So. 342; *Brown v. State (Miss.)*, 16 So. 202.

that it is a doubt based on reason and which is reasonable in view of all the evidence.¹

An indefinable doubt which cannot be stated with the reason upon which it rests so that it may be examined and discussed can hardly be considered a reasonable doubt; as such a one would render the administration of justice impracticable.² This definition—a doubt “for which you can give a reason”—has, however, been criticised in one State,³ and held erroneous in two or three others.⁴ In Indiana an instruction of this kind has been declared misleading and improper, as placing upon the defendant the burden of furnishing to every juror a reason why he is not satisfied of the defendant's guilt with that certainty which the law requires before there can be a conviction.⁵ But in an earlier case in Indiana it was said to be a doubt which is cognizable by the reason and dwells in the understanding, as distinguished from a doubt which is raised by fear, hope, love, hatred, fancy, feeling, prejudice, interest, or some of the motives which sway our natures and which flit through the emotions instead of resting in the mind.⁶

A charge on circumstantial evidence should be so guarded as to confine the action of the jury to facts, rather than mere surmises.⁷ The jury must not go outside of the evidence to

¹ *United States v. Meagher*, 37 Fed. Rep. 875; *United States v. McKenzie*, 35 Fed. Rep. 826; *United States v. Zes Cloya*, 35 Fed. Rep. 493; *Kidd v. State*, 83 Ala. 58; *State v. Ching Ling*, 16 Ore. 419; *State v. Schaffer*, 74 Iowa, 704; *Carr v. State*, 23 Neb. 749; *State v. Potts*, 20 Nev. 389; *State v. Streeter*, 20 Nev. 403; *United States v. King and Hopt v. Utah*, *supra*; *People v. Finley*, 38 Mich. 482; *People v. Cox*, 14 West. Rep. 432; 70 Mich. 247. And a doubt will be justified by such facts only as substantially impair the incriminating proof. *State v. Dill* (Del.), Nov. 6, 1889, 18 Atl. 763.

² *People v. Guidici*, 1 Cent. Rep. 721; 100 N. Y. 503; *U. S. v. Johnson*, 26 Fed Rep. 682; 3 Greenl. on Ev. (14th ed.) § 29 n.

³ *State v. Sauer*, 38 Minn. 488.

⁴ *Morgan v. State*, 48 Ohio St. 371. In *Ray v. State*, 50 Ala. 104, the following charge was declared confusing and misleading: “A reasonable doubt has been defined to be a doubt for which a reason could be given; a probability of the defendant's innocence is a just foundation for a reasonable doubt of his guilt.” But *Cohen v. State*, 50 Ala. 108, approved a charge couched in these very words, and this was followed in *Hodge v. State*, 97 Ala. 37.

⁵ *Siberry v. State*, 138 Ind. 677. But such a definition was held not ground for reversal when given in instructions where the court was seeking to distinguish a reasonable doubt from a vague and imaginary one. *State v. Morey* (Ore.), 36 Pac. 373.

⁶ *Wall v. State*, 37 Ind. 453.

⁷ *Myers v. State*, 6 Tex. Crim. App. 1.

hunt up doubts.¹ To justify acquittal the doubt must grow out of the evidence alone.² It must rest upon the fact that the evidence is insufficient in the judgment of the jury, to justify a verdict of guilty against the accused.³ It must be honestly entertained,⁴ and must be generated by an insufficiency of proof which fails to convince the judgment and conscience, and satisfy the reason of the jury as to the guilt of the accused.⁵ The prisoner should be acquitted, if, upon a careful review of the evidence, the jury are not convinced of his guilt.⁶

It makes no difference whether the doubt arises from a defect of evidence on the part of the prosecution or from the impression made by evidence for the defendant.⁷ It may arise from the want of evidence,⁸ or the jury may not believe some of the witnesses and may entertain a doubt in spite of the evidence.⁹ And where the court charged that a reasonable doubt usually arose from a want of evidence or a conflict of evidence, this was held reversible error in a case where whatever doubt there was turned solely upon the credibility of a part of the evidence.¹⁰ An instruction is clearly erroneous which announces that a preponderance of evidence in favor of the defendant is necessary in order to raise a reasonable doubt of his guilt.¹¹ And there may be a preponderance of evidence or a weight of preponderant evidence against the accused and yet a reasonable doubt of his guilt.¹² There must be more than a prepon-

¹ *Welsh v. State*, 11 So. 450; *Miller v. People*, 39 Ill. 457; *May v. People*, 60 Ill. 119; *Connaghan v. People*, 88 Ill. 460; *Dunn v. People*, 109 Ill. 685; *Gannon v. People*, 127 Ill. 507; *Wacaser v. People*, 134 Ill. 438; *Minich v. People*, 8 Colo. 440; *State v. Pierce*, 21 Md. 448; *Kelly v. People (Colo.)*; *U. S. v. Cassidy*, 67 Fed. Rep. 696.

² *State v. Dill (Del.)*, Nov. 6, 1889, 18 Atl. 763; *Cicely v. State*, 13 Smedes & M. 211; *Browning v. State*, 33 Miss. 47; *Bowler v. State*, 41 Miss. 570.

³ *State v. Coleman*, 20 S. C. 445; *State v. Senn*, 32 S. C. 392; *United States v. Carpenter*, 41 Fed. Rep. 330; *United States v. Keller*, 19 Fed. Rep. 633.

⁴ *People v. Stiebenvoll*, 62 Mich. 329.

⁵ *U. S. v. Harper*, 33 Fed. Rep. 471; *Purkey v. State*, 3 Heisk. 26.

⁶ *McGuire v. People*, 44 Mich. 286; *Donnelly v. State*, 26 N. J. L. 601.

⁷ *People v. Fairchild*, 48 Mich. 31.

⁸ *Hodgkins v. State*, 89 Ga. 761; *Long v. State*, 38 Ga. 491; *Brown v. State*, 105 Ind. 385; *Hale v. State (Miss.)*, 16 So. 387.

⁹ *Mickey v. Com.*, 9 Bush, 593; *Williams v. Com.*, 80 Ky. 313; *People v. Kerr*, 6 N. Y. Cr. R. 406.

¹⁰ *McElven v. State*, 30 Ga. 869.

¹¹ *State v. Porter*, 64 Ia. 237.

¹² *Walbridge v. State*, 13 Neb. 236. And see *State v. Red*, 53 Ia. 69.

derance of evidence to sustain conviction; there must be an abiding conviction to a moral certainty of the truth of the charge, derived from a comparison and consideration of all the evidence.¹

If the rule as to reasonable doubt be applied to the whole facts of the case, this will satisfy the demands of the law. It is not necessary that the court should charge the reasonable doubt as to every particular matter constituting the principal issue in the case.² And the cases sustain the proposition that the reasonable doubt the jury is permitted to entertain must be on the whole evidence and not as to any particular fact in the case.³ Any single material fact may not be singled out: it is not *any* fact proved by the defence which will justify a doubt of guilt, but such facts only as substantially impair the criminating proof.⁴ And since the case must be tried on all the evidence, an instruction is properly refused which asks the jury to acquit if a single fact proved to their satisfaction is inconsistent with the defendant's guilt.⁵

After refusing to charge that "each link in the chain of circumstantial evidence must be established to the same degree of certainty as the main fact itself," Judge Daniels, in a recent case in New York,⁶ charged the jury that "what the law designs is that these circumstances should be laid before the jury and massed together by them, not separately or distinctly, but together for the purpose of determining in their minds what the circumstances, when they are so massed and considered, sustained by the way of conclusion. These matters of circumstantial evidence have been described, not inaptly, as twigs, one of which would resist the application of no force whatever, but when you bind them together, one twig after another, until you make a cable or mass of them, they

¹ *People v. Brannon*, 47 Cal. 96; *People v. Ah Sing*, 51 Cal. 372, citing *Jane v. Com.*, 2 Met. (Ky.) 30; *State v. Oscar*, 52 N. C. 305.

² *McCullough v. State*, 23 Tex. Crim. App. 620; *King v. State*, 19 Id. 658; *Willis v. State* (Neb.), 61 N. W. 254.

³ *Webb v. State*, 9 Tex. Crim. App. 490; *Barr v. State*, 10 Id. 507; *Bressler v. People*, 117 Ill. 422; *Mullins v. People*, 110 Ill. 42; *Leigh v. People*, 118 Ill. 373; *Davis v. People*, 114 Ill. 98; *People v. Wolff*, 95 Mich. 625; *Jameison v. State*, 25 Neb. 185; *Siebert v. People*, 143 Ill. 571; *Weaver v. People*, 182 Ill. 536.

⁴ *State v. Dill*, 18 Atl. 763; *State v. Schoenwald*, 31 Mo. 147.

⁵ *State v. Johnson*, 37 Minn. 493.

⁶ *People v. Kerr*, 6 N. Y. Cr. R. 406.

present then a body of strength that can overcome nearly **all** forms of physical resistance. Circumstances are brought into the case, not to be considered separately and thrown away, because each, in and of itself, does not establish the theory on the part of the prosecution, and they are to be considered at large, one with the other, so far as they are supported and maintained by the evidence.”¹

And in another case, where a similar instruction to that refused in the preceding case was requested, the court charged as follows: “The defendant is presumed to be innocent of the crime charged until proved guilty beyond a reasonable doubt, and as the evidence in this case is circumstantial, it is your duty to give all the circumstances a careful and conscientious consideration, and if, upon such consideration, the minds of the jury are not firmly and abidingly satisfied of the defendant’s guilt; if the conscientious judgment of the jurors wavers and oscillates, then the doubt of the defendant’s guilt is reasonable, and you should acquit.”²

The doubt need not be a “clear and strong” one. The proper word is “reasonable,” that is, just, rational, conformable, or agreeable to that faculty of the mind by which it distinguishes truth from falsehood, and good from evil. It implies a want of that fulness and completeness of proof which would enable the mind satisfactorily to draw the conclusion of guilt from the facts in evidence.³

The Supreme Court of Oregon has recently, in a well-considered case, decided that a correct definition of the phrase is contained in an instruction which declares that a reasonable doubt “is not every doubt and is not a captious doubt, that it is such a condition of mind resulting from the consideration of the evidence before the jury as makes it impossible for them as reasonable men to arrive at a satisfactory conclusion; that it is not a consciousness that the conclusion arrived at may possibly be erroneous, but such a state of mind as deprives one of the ability to reach a conclusion that is satisfactory.”⁴

In Texas the following has been approved: A reasonable

¹ See also *Taylor v. State*, 9 Tex. Crim. App. 100; *Timmerman v. Terr.*, 8 Wash. 445.

² *State v. Hayden*, 45 Ia. 11.

³ *Bowler v. State*, 41 Miss. 570.

⁴ *State v. Roberts*, 15 Ore. 187.

doubt is such a doubt as fairly and naturally presents itself from the facts which the jury believe to be true. All the material facts which the jury believe to be true should lead in such a manner to the conclusion, to a moral certainty, that the defendant is guilty as that they cannot reasonably believe otherwise.¹

And the Supreme Court of the United States has held that the jury may be instructed thus: "If after an impartial comparison and consideration of all the evidence you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt."² While the Supreme Court of Maine has sanctioned this: A doubt which a reasonable man of sound judgment without bias, prejudice, or interest, after calmly, conscientiously, and deliberately weighing all the testimony, would entertain as to the guilt of the accused.³

In Georgia it has been said that there is no error in defining reasonable doubt as such a doubt as the term itself implies, as a doubt that has something to rest upon, some reason that it is based on; such a doubt as would control the jury, and that they would be governed by in their important business affairs; such a doubt as a sensible, honest-minded man would reasonably entertain in an honest investigation after truth; a doubt that would arise from the evidence or want of evidence in the case, not a mere vague conjecture or a bare possibility of the innocence of the accused.⁴

A definition which is frequently quoted and which is established as a safe definition is that of Judge Birchard in an early case in Ohio. According to that learned judge there is a reasonable doubt if the material facts without which guilt cannot be established may be fairly reconciled with innocence. When

¹ *Monroe v. State*, 23 Tex. 210; 76 Am. Dec. 58; *Brown v. State*, 1 Tex. App. 154.

² *Hopt v. Utah*, 120 U. S. 480; 30 L. Ed. 708. See also *State v. Gibbs*, 10 L. R. A. 749; 10 Mont. 218; *United States v. King*, 84 Fed. Rep. 302; *Owens v. State*, 53 Ala. 400; *Mose v. State*, 36 Ala. 211.

³ *State v. Reid*, 62 Me. 129. See also *People v. Stott*, 4 N. Y. Cr. R. 306.

⁴ *Fletcher v. State*, 90 Ga. 468.

a full and candid consideration of the evidence produces a conviction of guilt, and satisfies the mind to a reasonable certainty, a mere captious or ingenious artificial doubt is of no avail.¹

And in that justly celebrated opinion,² so many times quoted in this volume, Chief Justice Shaw said: "It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are

¹ *Clark v. State*, 12 Ohio, 483. And see *Morgan v. State*, 48 Ohio St. 371.

² That delivered in the case of *Com. v. Webster*, 5 Cush. 295; 52 Am. Dec. 711, quoted and followed as to this point in the following cases among others: *People v. Strong*, 30 Cal. 151; *State v. Nelson*, 11 Nev. 334; *State v. Jones*, 19 Nev. 385; *Donnelly v. State*, 26 N. J. L. 601; *People v. Schryver*, 43 N. Y. 1; *People v. Beck*, 58 Cal. 43; *Lovett v. State*, 17 L. R. A. 705; *Hampton v. State*, 1 Tex. Crim. App. 652; *Pogue v. State*, 12 Id. 283. For a full discussion of "what constitutes a reasonable doubt in criminal cases," see an annotation by the author, appended to the case of *Lovett v. State*, 17 L. R. A. 705. In addition, see the following recent cases which have considered the subject: *People v. Smith* (Cal.), 39 Pac. 40; *Gregg v. State* (Ala.), 17 So. 321; *Chitister v. State* (Tex. Crim. App.), 28 S. W. 683; *Loggins v. State*, 32 Tex. Crim. App. 364; *Carson v. State* (Tex. Crim. App.), 30 S. W. 799; *Hester v. Com.* (Ky.), 29 S. W. 875; *Franklin v. State* (Tex. Crim. App.), 31 S. W. 643; *De Los Santos v. State* (Tex. Crim. App.), 26 S. W. 831. And in the following cases, instructions involving this question have been held erroneous: *Jackson v. State* (Ala.), 17 So. 333; *Rhea v. State* (Ala.), 14 So. 853; *State v. Smith* (Conn.), 31 Atl. 206; *Le Comte v. U. S.*, 23 Wash. L. Rep. 482; *U. S. v. Romero* (Ariz.), 35 Pac. 1059; *Cochran v. U. S.*, 157 U. S. 286.

bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt; because if the law, which mostly depends upon considerations of a moral nature, should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether."

The rules of evidence, as founded on reason and consecrated in the judgments of the courts, constitute the best means for discovering truth, and are an integral part of our legal system, essential alike for private and social security.¹ Nevertheless, language of most dangerous tendency in regard to them has occasionally fallen from learned judges, which implies that they may be modified, according to the enormity of the crime, or the weightiness of the consequences which attach to conviction. Lord Finch, afterwards Lord Chancellor Nottingham, on the trial of Lord Cornwallis, said, "The fouler the crime is, the clearer and the plainer ought the proof to be."² "The more flagrant the crime is," said Mr. Baron Legge, "the more clearly and satisfactorily you will expect that it shall be made out to you."³ Mr. Justice Holroyd is represented to have said that "the greater the crime, the stronger is the proof required for conviction."⁴ And similar language is to be found in some of the text-books.⁵

Upon a trial for high treason, Lord Chief Justice Dallas, after adverting to the extreme guilt of the crime, as seeking the subversion of the established government, and aiming at the property, the liberty, and the lives of all, said: "Still, however, nothing will depend upon the comparative magnitude of the offence; for be it great or small, every man standing in the situation in which the prisoner is placed is entitled to have the charge against him clearly and satisfactorily proved; with only this difference (and I make the observation at the outset, as being in favor of the prisoner), that in proportion to the magnitude of the offence, and the consequences which result from his conviction, ought the proof to be clear and satisfactory."⁶ In the case of the Glasgow cotton-spinners for conspiracy and murder, the learned Lord Justice Clerk Boyle said that the

¹ *Giles v. State*, 6 Ga. 276.

² 7 St. Tr. 149. And see *Rex v. Crossley*, 26 St. Tr. 218.

³ *Rex v. Blandy*, 18 St. Tr. 1186. ⁴ *Rex v. Hobson*, 1 Lewin's C. C. 261.

⁵ See the work of Judge Swift on Evidence, p. 151.

⁶ *Rex v. Ings*, 88 St. Tr. 1185.

magnitude of the charge ought to have no other effect than rendering it more necessary that the jury should be fully satisfied that the evidence is clear upon the subject.¹ The distinction was more broadly laid down by the late Lord Justice Clerk Cockburn, in *Madeleine Smith's case*. "In drawing an inference," said the learned judge, "you must always look to the import and character of the inference which you are asked to draw;" and the same distinction pervades the whole of the charge in that celebrated case.

These dicta are opposed to the principles of reason, and inconsistent with all established rules of law. No legal doctrine is more firmly settled than that there is no difference between the rules of evidence in civil and criminal cases. The rules which govern the admission of evidence apply with equal authority and force in criminal and civil proceedings. These rules must be received in all cases as the surest guide which the law affords for ascertaining the truth of any alleged matter of fact, and must be the same both on the criminal and civil side of the court, whatever the nature of the fact to be investigated. There can be no safe departure from them under the influence of a feeling of tenderness or humanity for persons charged with crime.² If under any circumstances they may be relaxed according to notions of supposed expediency, they cease to be, in any correct and intelligible sense, rules for the discovery of truth, and the most valued rights of civilized men become the sport of chance. The logical consequences of any such power of relaxation would be, that the rules of evidence are radically different in civil and criminal cases, and different even in criminal cases, as they are applied to particular classes of crime, according to some arbitrary and imaginary measure for estimating their relative enormity and penalty. Is the dictum, it may be asked, to be restricted to cases where the consequence of conviction may be loss of life? Is it to be repudiated when it may be followed by the inferior penalties of fine

¹ *Reg. v. Hanson and others*, Court of Justiciary, 1838; *Short-hand Rep.* 366.

² See remarks of ABBOTT, J., in *Rex v. Watson*, 2 Stark. (3 C. C. L.) 155, and of WALWORTH, J., in *People v. Thayers*, 1 Park. Cr. R. 595; *Rex v. Murphy*, 8 C. & P. (34 E. C. L.) 306; *Lord Melville's Case*, 29 How. St. Tr. 763; *Com. v. Abbott*, 130 Mass. 472; *U. S. v. Britton*, 2 Mason, 464; *Roscoe Cr. Ev.* (8th Am. Ed.) 1; 8 *Russ. on Crimes* (9th Am. Ed.), 212; *Brown v. Schock*, 77 Pa. St. 471.

or imprisonment? Is it to be applied or rejected in application to the numerous cases, civil as well as criminal, where physical and social consequences may follow, which, though of a different kind, may be scarcely less fatal to the individual than loss of liberty, or even of life itself? And if the maxims of evidence may be made more stringent in one direction, there is no reason why they may not be relaxed in another, according to the greater difficulties incidental to the proof of the more atrocious and dangerous forms of crime, as some writers on the civil law have actually maintained. A distinguished historical writer, whose opinions on every question of legal science or of constitutional principle are eminently entitled to respect, with the strictest philosophical truth, and with great felicity of illustration, has thus denounced the doctrine under review: "The rules of evidence no more depend on the magnitude of the interests at stake than the rules of arithmetic. We might as well say that we have a greater chance of throwing a size when we are playing for a penny, than when we are playing for a thousand pounds, as that a form of trial which is sufficient for the purposes of justice, in a matter of liberty and property, is insufficient in a matter affecting life. Nay, if a mode of proceeding be too lax for capital cases, it is, *à priori*, too lax for all others; for in capital cases the principles of human nature will always afford considerable security. No judge is so cruel as he who indemnifies himself for scrupulosity in cases of blood, by license in affairs of smaller importance. The difference in tale on the one side far more than makes up for the difference in weight on the other."¹

While the rules of evidence are the same in civil and criminal cases, there is a difference in the nature of the issue, and consequently, as has been pointed out, in the *quantum* of proof.² For while, in civil cases, a preponderance of evidence is sufficient to justify a verdict, in criminal cases, a conviction cannot be had upon any preponderance of evidence unless it generates full belief to the exclusion of all reasonable doubt.³ This difference between the rules as to presumptions in civil and criminal cases has been said to arise from this: that in civil cases it is always necessary for a jury to decide the question at issue between the parties. However much therefore they may be perplexed, they

¹ 1 Macaulay's *Essays* (1st Ed.), 143.

² 2 Bish. *Crim. Proc.* (2d Ed.) § 1064.

³ 3 Greenl. on *Ev.* § 29

cannot escape from giving a verdict founded upon one view or the other of the conflicting facts before them. Presumptions therefore are necessarily made upon comparatively weak grounds. But in criminal cases there is always a result open to the jury which is practically looked upon as merely negative, namely, that which declares the accused to be *not guilty* of the crime with which he is charged.¹

It is contended that there is an exception to this general rule where the issue in a civil case is one in which crime is imputed and the guilt or innocence of a party is directly or incidentally involved. This exception is most frequently invoked in actions of libel and slander, where a justification imputing crime is pleaded, and actions on fire policies where the defence is that the property was wilfully burned by the insured. The doctrine that, in an action on a policy, the defence that the plaintiff had wilfully set fire to the premises must be as fully and satisfactorily proved as if the plaintiff were on trial on indictment, originated in the case of *Thurtell v. Beaumont*.²

In an early case in Ohio the defendant was charged with having burnt his own boat with the intent of defrauding the company of the insurance money. It was held that the evidence must be so strong as to satisfy the jury beyond a reasonable doubt that the boat was so burnt.³

And in a later case it was said to be established law that, in civil as well as in criminal cases, a party cannot be found guilty of a crime unless upon proof which excludes all reasonable doubt.⁴

A case in Iowa which has been often cited was an action for burning the plaintiff's wheat. The defendant insisted that, to

¹ McNally Ev. p. 578 ; 1 Phil. Ev. (10th Ed.) 456 ; 1 Roscoe's Cr. Ev. (8th Am. Ed.) 28.

² 1 Bing. (8 E. C. C.) 339. And this is said to be the rule in England. See 1 Taylor's Ev. (5th Ed.) 97a. In England there was a reason for carrying the distinction thus made between civil and criminal cases into suits of this description. There, as Lord KENYON remarked in *Cork v. Field*, 3 Esp. 138, "where a defendant justifies words which amount to a charge of felony, and proves his justification, the plaintiff may be put upon his trial by that verdict without the intervention of a grand jury." See note (a) to *Willmet v. Harmer*, 8 C. & P. 695. And see Stephen's Dig. Ev. Art. 94, 1 Greenl. Ev. (14th Ed.) § 13a, note.

³ *Lexington Ins. Co. v. Pauer*, 16 Ohio, 324. And see 2 Greenl. on Ev. § 408.

⁴ *Strader v. Mullane*, 17 Ohio St. 624.

recover for an act which is a crime, the cause of action must be made out with the same degree of proof as would be necessary to convict the defendant upon an indictment. And this position was sustained.¹ But this case has been since overruled.² And the generally received doctrine now is that there is no rule of evidence which requires a greater degree of proof to authorize a verdict in one civil action than in another by reason of the peculiar questions involved,³ and that in an action upon a policy of insurance where the defence is that the plaintiff wilfully set fire to the building insured, the rule of evidence is the same as in other civil cases, and the jury must determine the issue upon the weight or preponderance of evidence.⁴

Judge Depew, delivering the judgment of the court, in a case cited in the last note⁵ to the former paragraph, said that, "actions of libel and slander, on an issue upon a justification, might be regarded as exceptional in character. A defendant in such an action, if he was warranted in giving publicity to the defamatory words by the occasion of publishing or uttering them, may discharge himself if he shows by a preponderance of evidence that the occasion was such as to make the communication a privileged communication. But if he published or uttered the defamatory words under other circumstances, in doing so he was a mere volunteer without any personal or private interest in the subject-matter. In putting his justification on the ground of the plaintiff's guilt of the accusation, he undertakes to prove the plaintiff's guilt, which comprises not only the doing of the act, but also the intent which the law denounces as criminal. As a matter of pleading, he is bound to plead with precision, a justification as broad as the accusation attempted to be justified and containing all the ingredients necessary to the commission of the crime; and as a question of

¹ *Barton v. Thompson*, 46 Ia. 80. See further to the same effect, *McConnell v. Delaware Mut. Safety Ins. Co.*, 18 Ill. 228; *Butneau v. Hobbs*, 85 Me. 237.

² *Welch v. Jugenheimer*, 56 Ia. 11; *Kendig v. Overhulser*, 58 Ia. 195.

³ *Robinson v. Randall*, 82 Ill. 521; *Hall v. Barnes*, Id. 228; *Watkins v. Wallace*, 19 Mich. 57; *Elliott v. Van Buren*, 38 Mich. 49.

⁴ See *Kane v. Hibernia Ins. Co.*, 39 N. J. L. 697; *Washington Union Ins. Co. v. Wilson*, 7 Wis. 169; *Wright v. Haedy*, 22 Wis. 348; *Blaeser v. Milwaukee Mech. Mut. Ins. Co.*, 37 Wis. 81; *Rothschild v. Am. Ins. Co.*, 62 Mo. 356; *Bradish v. Bliss*, 35 Vt. 326; *Scott v. Home Ins. Co.*, 1 Dill. 105; *Hoffman v. W. M. & F. Ins. Co.*, 1 La. Ann. 216.

⁵ *Kane v. Hibernia Ins. Co.*, *supra*.

evidence he is bound to make his proof co-extensive with the averments in his plea. Under such circumstances it is neither impolitic nor unreasonable to require the truth of the accusation to be established by the same degree of proof as is required on the trial of an indictment." But several of the judges declined to be committed to these propositions. And it is perhaps the better rule that there is no difference between a justification in slander and any other case where the plaintiff's cause of action, or the defendant's ground of defence, is to be supported by proving that the other party has committed a crime.¹

In an action for slander in charging the plaintiff with having committed adultery, the court thought it best to draw the line between the cases where full proof beyond a reasonable doubt shall be required, and those where a less degree of assurance may serve as the basis of a verdict, "where the juror instinctively places it, making it to depend rather upon the results which are to follow the decision, than upon a philosophical analysis of the character of the issue."²

A learned judge has said that "it is as unreasonable to require a civil suit to be determined by the rules of evidence applicable to a criminal prosecution, as it would be to require a tailor to measure A. when he is going to make a suit of clothes for B. The measure of proof must be determined by the character of the issue being tried."³

And where the defendant was charged with being the father of a bastard child, and the object of the suit was to compel him to contribute towards the child's support, it was held not necessary that the jury should be satisfied beyond a reasonable doubt of his guilt.⁴

In trover, where the evidence was such as to involve a charge of larceny, a direction to the jury that the evidence, to justify a verdict against the defendant, must satisfy them of the truth of the charge beyond a reasonable doubt, was held to be erroneous.⁵

¹ *Briggs v. Cooper*, cited in *Bradish v. Bliss*, 35 Vt. 326. And see *Folsom v. Brown*, 25 N. H. 114.

² *Ellis v. Buzzell*, 60 Me. 209.

³ Judge WALTON, in *Knowles v. Scribner*, 57 Me. 495.

⁴ *Knowles v. Scribner*, *supra*. And see *People v. Phalen*, 49 Mich. 492.

⁵ *Bissell v. West*, 35 Ind. 54.

In an action to recover for cattle which had been stolen, it was held not essential to recovery that the felonious taking must be made out in the same manner as if it was a public prosecution.¹

And where the plaintiff sued for the wrongful and malicious killing of her husband, it was laid down that it was not necessary to a recovery of damages that the defendant's guilt should be established beyond a reasonable doubt, but that it was sufficient for the plaintiff to make out her case in accordance with the rule prevalent in other civil cases.²

In a case in Minnesota the question arose whether a charge of fraud in a civil action, like the charge of crime in an indictment, must be proved by satisfactory evidence excluding all reasonable doubts. The cause of action, if sustained, implied an offence against the statute; and it was claimed the court must first determine whether the facts stated in the pleadings, or adduced by the evidence, were sufficient upon which to predicate a criminal charge, and, if so, then to apply the criminal rule to the trial of the case, even though the issue actually raised by the pleadings in no way involved the determination of the fact of a criminal offence having been committed. The court said this was unsound in principle and unsupported by authority.³

And an instruction that "in order to set aside a will, on the ground of undue influence, it must be shown that the circumstances of its execution are inconsistent with any other hypothesis than such undue influence," was declared manifestly erroneous.⁴

In an action on a promissory note, the defence that the note was obtained by false and fraudulent representations, might, it was held, be sustained by a preponderance of evidence, as in other civil cases.⁵

With regard, however, to the quantity of evidence required to prove the fact of adultery, there seems to be no approach to uniformity in the authorities.

¹ *Munson v. Atwood*, 30 Conn. 102. To the same effect see *Hitchcock v. Munger*, 15 N. Y. 102.

² *Nichols v. Winfrey*, 79 Mo. 544.

³ *Burr v. Wilson*, 22 Minn. 206. See also *Stranathan v. Greaves*, 26 Ohio St. 2.

⁴ *Gay v. Gillelan*, 92 Mo. 250.

⁵ *Gordon v. Parmlee*, 15 Gray, 418.

Lord Stowell stated the rule to be that "there must be such proximate circumstances proved as, by former decisions, or on their own nature and tendency, satisfy the legal conviction of the court that the criminal act has been committed."¹

Elsewhere it is said that the court is not warranted in a conclusion when all that is proved is susceptible of a construction of innocence.²

An action for divorce on the ground of adultery is not infrequently attended with the most serious consequences, destroying the family, leaving a stain upon the name of innocent offspring, and affecting the property rights and civil status of the parties, and therefore it would seem eminently proper that the court should proceed with great caution, and require the party making the charge to establish the truth of the fact to a reasonable and moral certainty.³

¹ *Williams v. Williams*, 2 Hagg. Con. 299. It may be remarked here that by the common law the act of adultery was not punishable by indictment, but was left to the cognizance of the spiritual courts alone. See 2 Greenl. on Ev. § 48.

² *Hamerton v. Hamerton*, 2 Hagg. Con. 13; *Conger v. Conger*, 82 N. Y. 608; *Mayer v. Mayer*, 21 N. J. Eq. 246; *Dailey v. Dailey*, Wright, 514.

³ *Freeman v. Freeman*, 31 Wis. 235. And see *Berckmans v. Berckmans*, 17 N. J. Eq. 458; *Warner v. Com.*, 2 Va. Cas. 105.

PART V.

PROOF OF THE CORPUS DELICTI.

DIVISION I.

GENERAL PRINCIPLES.

CHAPTER I.

GENERAL DOCTRINE AS TO THE PROOF OF THE CORPUS DELICTI.

By the *corpus delicti* is meant the existence of a criminal fact.¹ On a trial for arson the *corpus delicti* consists not only of the fact that a building has been burned, but also that it was wilfully fired by some responsible person:² on a trial for larceny, that the property was so taken and carried away from the possession of the owner as to constitute such taking and carrying away a felony.³

Proof of the charge in criminal cases involves the establishment of two distinct propositions: namely, that an act has been committed from which legal responsibility arises, and that the guilt of such act attaches to a particular individual.⁴

The evidence, however, is not always separable into distinct parts, or applicable to each of those propositions. Where the defendants were accused of the theft of a horse, the *corpus delicti* was shown by the same facts as were admitted to connect the defendants with the crime. The horse had been

¹ See *People v. Palmer*, 109 N. Y. 110.

² *Phillips v. State*, 29 Ga. 105; *Winslow v. State*, 76 Ala. 42; *Carlton v. People*, 150 Ill. 181.

³ *Tyner v. State*, 5 Humph. 333.

⁴ *Smith v. Com.*, 21 Grat. 809; *Johnson v. Com.*, 29 Grat. 796; *Willard v. State*, 27 Tex. Crim. App. 386.

placed by the owner in a stable belonging to a neighbor with whom he was staying that night, and the saddle and bridle were deposited near the door. In the morning horse, saddle, and bridle were gone, and the owner never thereafter saw them. It was shown that on the day and night after the disappearance of the horse, the defendants had gone northward with the team and wagon of F., one of them. But F. drove only two horses, while there were seen the tracks of three horses. It was also shown that a couple of men with a span of horses and a wagon, and a led horse, were seen stopping a short distance from the road travelled by the defendants. The description of the horses and wagon corresponded with those of the accused, as did that of the led horse with the animal alleged to have been stolen. These with other minute facts were held sufficient to establish the fact of the stealing, and to convict the defendants.¹

On trial of an indictment for bribery, proof of the *corpus delicti* was said to be the same thing as proof of the defendant's connection with the crime.²

But in another case where the trial court had instructed the jury that the circumstances were so inseparable that they must determine from the same evidence the existence of the *corpus delicti* and the connection of the defendant with the crime, the conviction was reversed.³

An illustration of the proposition just laid down is to be found in the case of adultery. It is evident that direct proof ought not to be required to sustain a charge of this character, and that circumstantial evidence must generally be relied on. And generally those circumstances which show the commission of the offence will establish also the guilt of the parties charged.

Concerning this, Lord Stowell said, in a passage often quoted :⁴ "It is a fundamental rule that it is not necessary to prove the direct fact of adultery, because, if it were otherwise, there is not one case in a hundred in which that proof would be attainable—it is very rarely indeed that parties are surprised in the direct fact of adultery. In every case, almost,

¹ *State v. Folwell et al.*, 14 Kan. 105.

² *People v. O'Neil*, 109 N. Y. 251. See opinion of ANDREWS, J.

³ *State v. Davidson*, 30 Vt. 377.

⁴ *Loveden v. Loveden*, 4 Eng. Ecc. R. 461.

the fact is inferred from circumstances that lead to it by fair inference as a necessary conclusion ; and unless this were the case, and unless this were so held, no protection whatever could be given to marital rights. What are the circumstances which lead to such a conclusion cannot be laid down universally, though many of them, of a more obvious nature and of more frequent occurrence, are to be found in the ancient books—at the same time it is impossible to indicate them universally, because they may be infinitely diversified by the situation and character of the parties, by the state of general manners, and by many other incidental circumstances, apparently slight and delicate in themselves, but which may have most important bearings in decisions upon the particular case. The only general rule that can be laid down upon the subject is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion ; for it is not to lead a harsh and intemperate judgment moving upon appearances that are equally capable of two interpretations ; neither is it to be a matter of artificial reasoning judging upon such things differently from what would strike the careful and cautious consideration of a discreet man.” One making an accusation of this kind should be able to allege times and places and to make proof of circumstances with some degree of particularity. When facts and circumstances introduced in evidence fairly and reasonably lead to the conclusion that the act has been committed, the court or jury may find the charge sustained.¹ Where from the evidence in an action for divorce the probabilities are equal as to guilt or innocence, the interpretation of innocence will be adopted.²

The most usual circumstances relied on to sustain this charge are thus noticed by Chief Justice Shaw : “Suppose, for instance, a married woman had been shown by undoubted proof to have been in an equivocal situation with a man not her husband, leading to a suspicion of the fact. If it were proved that she had previously shown an unwarrantable predilection for that man ; if they had been detected in clandestine correspondence, had sought stolen interviews, made passionate declarations ; if her affection for her husband had been alien-

¹ *Cooke v. Cooke*, 152 Ill. 286 ; *Miller v. Miller*, 20 N. J. Eq. 217.

² *O'Brien v. O'Brien* (N. J. Eq.), 80 Atl. 875.

ated ; if it were shown that the mind and heart were already depraved, and nothing remained wanting but an opportunity to consummate the guilty purpose, then proof that such opportunity had occurred would lead to the satisfactory conclusion that the act had been committed. But when these circumstances are wanting ; when there has been no previous unwarrantable or indecent intimacy between the parties, no clandestine correspondence, or stolen and secret interviews, the fact of opportunity and equivocal appearances would hardly raise a passing cloud of suspicion over the fair fame of such a woman.”¹

While it is clearly not possible to lay down beforehand in a formal rule what circumstances shall and what shall not constitute satisfactory proof of the fact of adultery, yet the courts will not infer the guilt of the parties from the opportunity alone.² Proof that the parties were together in a place and at a time when and where it was possible for them to have been guilty is not sufficient, and this defect of proof is not supplied by proof that many years before the defendant had lived in concubinage with another man.³ There must be evidence not only of the opportunity to commit the act, but also of the will to improve the opportunity.⁴ Where both the opportunity for the act and the will to commit it are established the court will infer guilt.⁵

In an action for divorce on the ground of adultery it appeared that the rooms in which the parties were shown to have been together were the place of business of the plaintiff, and people went in and out there frequently ; but there was no proof of a kiss, or an embrace, or a contact, a nearness of person, or an endearment of any kind, or of a surprise in an equivocal situation, or of confusion of face on a sudden entrance, or anything clandestine in conduct, or which showed a desire for secrecy or concealment. Having reviewed the evidence and pointed out the absence of proof of the existence of these indications of guilt, the court said : “ It is contrary to the usual experience of mankind, not only as gathered in one’s own ob-

¹ *Dunham v. Dunham*, 6 L. R. 141. And see *Blake v. Blake*, 70 Ill. 618.

² *Freeman v. Freeman*, 81 Wis. 235.

³ *Larison v. Larison*, 20 N. J. Eq. 100.

⁴ *Pollock v. Pollock*, 71 N. Y. 137. See *Bishop on Marriage, Divorce and Separation*, § 1370.

⁵ *Berckmans v. Berckmans*, 26 N. J. Eq. 122.

servation, but as disclosed by the reports of such cases, that if the relations existed between the parties as charged they should not, at some time during the period, have incautiously or recklessly betrayed the fact by some of the means above specified."¹ Where intimacy between the parties was shown, but of such a nature as, in their relative situations, might have been without criminality, the bill was dismissed.² General cohabitation—that is, in the sense of being together all or most of the time in the same household, not the living together ostensibly as husband and wife—apart from suspicious circumstances characterizing it, is not enough to warrant an inference of the fact of adultery.³ In connection with the fact of general cohabitation must be considered the condition and rank in life of the parties, the habits and conduct of themselves and their equals in society, the domestic relations which each of them maintain with their own kin, the secluded, or open and avowed, place of cohabitation, the avocation of the parties and what demand it makes for constant or frequent intercourse, and all other things which go to show that the living or being together is or is not necessary, reasonable, and compatible with innocence.⁴ When the relations of a man and woman are illicit in their origin, cohabitation will not be regarded as evidence of marriage.⁵

Adultery will be presumed from the fact that the man and woman occupy one bed;⁶ and where the parties occupy the same room, in which is only one bed, for several months.⁷ In one case the following circumstances, taken together, were considered as pointing to the conclusion of guilt: that the party with whom it was charged that the wife had committed the act, paid her frequent visits at a time when her husband was absent; that the parties were frequently seen together in secret and notorious localities and at unusual hours, without its being shown that they had occasion to meet for any honest or innocent purpose;⁸ that she allowed him to take familiarities with her person; and that the respondent furnished the wife

¹ Pollock v. Pollock, *supra*.

² Mayer v. Mayer, 21 N. J. Eq. 246.

³ Hart v. Hart, 2 Edw. Ch. 207.

⁴ Pollock v. Pollock, *supra*.

⁵ Crymble v. Crymble, 50 Ill. App. 544.

⁶ Clapp v. Clapp, 97 Mass. 581.

⁷ Scroggins v. Scroggins, Wright (Ohio), 212.

⁸ State v. Marion, 35 N. H. 22.

with money to defend the suit.¹ On the other hand, the court thought, that the fact that the persons were together in lonely places, or that they were frequently together at night at the house of the defendant when her husband was absent, would not of itself furnish evidence sufficient to justify the court in declaring that they had committed adultery.² The visit of a married man to a brothel is a strong circumstance of suspicion;³ and his remaining alone in a room, at such a place, for some time, with a common prostitute, has been held sufficient proof of guilt.⁴ But a visit of this sort, as has been pointed out by Mr. Bishop, might be one of philanthropy or of lawful business, and is therefore open to explanation.⁵ A defendant was seen to enter about midnight a house of assignation, and to hold in his embrace one of the inmates. Shortly after all the lights of the house were extinguished, and the defendant did not leave the house till nine next morning. This was held ample.⁶

The mere fact that a married woman visited a man other than her husband at his lodgings, without other incriminating circumstances, has been held insufficient to convict her of adultery. In *Williams v. Williams*,⁷ the husband had forbidden the alleged paramour, Thomas, to come any more to his house. Thomas thereupon took lodgings, where the wife visited him, staying a considerable time, and they passed there for husband and wife. Lord Stowell, distinguishing the case from another, said: "It is not proved nor assumed that she took the name of Mrs. Thomas. He called her so and said that she was his wife, but it is not proved that she called him her husband, or that she knew that he called her his wife; he might speak of her in that name, but that will not show her knowledge of the fact. The only circumstance of clandestinity which is proved is that Thomas attended her almost to her own house, and then left her; but that the court should infer that this happened from a clandestine intention, or that it

¹ *Patterson v. Patterson* (N. J., July, 1890), 20 Atl. Rep. 347.

² *Whitenack v. Whitenack*, 46 N. J. Eq. 474.

³ *Astley v. Astley*, 1 Hagg. Ecc. R. 720; *Kenrick v. Kenrick*, 4 Id. 114.

⁴ *Astley v. Astley*, *supra*; *Dailey v. Dailey*, 64 Ill. 329.

⁵ 2 Bish. Mar. & Div. § 626; 2 Greenl. on Ev. (14th Ed.) § 44, and note α, p. 38; *Latham v. Latham*, 30 Grat. (Va.) 307.

⁶ *Cooke v. Cooke*, 152 Ill. 286.

⁷ 1 Hagg. Con. 299; 4 Eng. Ecc. R. 415.

might not be by accident, is, I think, not warranted by any rules of evidence on which this court can safely proceed. The question then comes to this: Does the visit of a married woman to a single man's lodging or house, in itself, prove the act of adultery? There is no authority mentioned for such an inference but the case of *Eliot v. Eliot*, which is open to the distinction, arising from the character of the house in that case, which is too obvious to be overlooked. It would be almost impossible that a woman could go to such a place but for a criminal purpose; but in the case of a private house, I am yet to learn that the law has affixed the same imputation on such a fact. In the late case of *Ricketts v. Taylor* in the King's Bench, the visit of the wife to a single man's house, combined with other circumstances, was held sufficient. In that case the windows were shut, and there were letters which could not be otherwise explained. That case, therefore, is no authority in this inquiry, and, though the court might be induced to think that such visits were highly improper, it must recollect that more is necessary, and that the court must be convinced in its legal judgment that the woman has transgressed not only the bounds of delicacy but also of duty."

But in a late case the proof of the wife's visits was accompanied by proof of other circumstances strong enough in their incriminating tendency to sustain the charge. Her visits to her alleged paramour were clandestine, so far as her husband and family were concerned; she visited him when her absence from home was ostensibly for other purposes; and although he had been an acquaintance at her own house, she never mentioned the fact of their renewed meetings to her husband. She passed at his boarding place as his wife. She visited him when he was presumably in bed; and she dressed and undressed in the room. "These facts," said the learned judge, "taken in connection with what has been pointed out as to her conduct with others, leave no room for doubt that desire and opportunity met on the occasion of these visits with the presumable results."¹

The existence of the criminal fact must be established by clear and decisive evidence.

¹ *Graham v. Graham*, 50 N. J. 701. See an article by the author on evidence required to establish adultery in 89 Cent. L. J. 381. Much of that article is reproduced here by the kind permission of the Central Law J. Co.

Such a complication of difficulties occasionally attends the proof of crime, and so many cases have occurred of convictions for alleged offences which have never existed, that it is a fundamental and inflexible rule of legal procedure, of universal obligation, that no person shall be required to answer, or be involved in the consequences of guilt, without satisfactory proof of the *corpus delicti*, either by direct evidence, or by cogent and irresistible grounds of presumption.¹ "The rule should be adhered to with the utmost and strictest tenacity, that the fact forming the basis of the offence or *corpus delicti* must be proved either by direct testimony or by presumptive evidence of the most cogent or irresistible kind. In one of these methods the essential fact or facts must be established beyond a reasonable doubt."²

The *corpus delicti* of the making, procuring, etc., of dynamite with intent to use the same for the unlawful destruction of the lives of certain persons, is sufficiently proved by evidence of the fact that defendant had such explosives in his possession and kept them concealed, and on different occasions threatened to take the lives of such persons, and said he would throw bombs at them wherever he might meet them.³

On a trial for murder, evidence was held to have been improperly admitted, as to its order, which tended to show improper relations of the defendant with other women, and unconnected with the illness and death of the deceased. The evidence went to show the motive of the accused, and should not have been submitted to the jury until the criminal death was established.⁴

If it be objected that rigorous proof of the *corpus delicti* is sometimes unattainable, and that the effect of exacting it must be that crimes will occasionally pass unpunished, it must be admitted that such may possibly be the result; but it is answered that, where there is no proof, or, which is the same thing, no sufficient legal proof of crime, there can be no legal criminality. In penal jurisdiction there can be no middle term; the party must be absolutely and unconditionally guilty

¹ *Rex v. Burdett*, 4 B. & Ald. 123.

² See opinion of the court in *State v. Keeler*, 28 Ia. 551. See also *Rex v. Yend*, 6 C. & P. 176; *Pitts v. State*, 48 Miss. 472.

³ *Hornek v. People*, 184 Ill. 139; 8 L. R. A. 887.

⁴ *People v. Hall*, 42 Mich. 485; *People v. Millard*, 53 Mich. 67.

or not guilty. Nor under any circumstances can considerations of supposed expediency ever supersede the immutable obligations of justice; and occasional impunity of crime is an evil of far less magnitude than the punishment of the innocent. Such considerations of mistaken policy led some of the writers on the civil and canon laws to modify their rules of evidence, according to the difficulties of proof incidental to particular crimes, and to adopt the execrable maxim, that the more atrocious was the offence, the slighter was the proof necessary; *in atrocissimis leviores conjecturæ sufficiunt, et licet judici jura transgredi*. Such indeed is the logical and inevitable consequence, when, from whatever motive, the plea of expediency is permitted to influence judicial integrity. The clearest principles of justice require that whatever the nature of the crime, the amount and intensity of the proof shall in all cases be such as to produce the full assurance of moral certainty.

CHAPTER II.

PROOF OF THE CORPUS DELICTI BY CIRCUMSTANTIAL EVIDENCE.

BOTH the *corpus delicti* or criminal act, and the agency of the accused therein, must be proved beyond a reasonable doubt, to sustain a conviction.¹

But no one kind of evidence can always be demanded in proof of the *corpus delicti* any more than of any other fact.²

It is clearly established that it is not necessary that the *corpus delicti* should be proved by direct and positive evidence, and it would be most unreasonable to require such evidence.

For example, on a prosecution for arson, the evidence tending to show the *corpus delicti*, so as to lay a foundation for any legal evidence that the act was committed by the accused and with a criminal intent, need not be direct and positive, but may be circumstantial.³

If the jury are satisfied of the essential facts beyond a reasonable doubt, it matters not whether they are conducted to this result by direct or presumptive evidence.⁴ The rule that the *corpus delicti* must be proved beyond a reasonable doubt was intended as a shield for prisoners, said Chief Justice Earl, and must never be used as a sword.⁵ It is therefore settled that circumstantial evidence will suffice to establish the *corpus delicti* of even the greatest offences.⁶ Were this not so,

¹ State v. Parsons, 39 W. Va. 464.

² Willard v. State, 27 Tex. Crim. App. 386. And see 1 Bish. Crim. Proc. § 1071.

³ Carlton v. People, 150. Ill. 181.

⁴ State v. Keeler, 28 Ia. 551. And see Brown v. State, 1 Tex. Crim. App. 154; State v. Winner, 17 Kan. 298; Anderson v. State, 24 Fla. 139; Johnson v. Com. (Ky.), 17 Cent. L. J. 428; 4 Cr. L. Mag. 902; State v. Dickson, 78 Mo. 438; Timmerman v. Terr., 17 Pac. 624.

⁵ People v. Schryver, 42 N. Y. 1.

⁶ State v. Hunter, 50 Kan. 302; State v. Winner, *supra*; State v. Ah Chuey, 14 Nev. 79; State v. Cordelli, 19 Nev. 319.

the murderer might secure himself by casting the body into the sea, or by consuming it with fire, or by disposing of it in such a way that it could not be identified.¹

Crimes, and especially those of the worst kinds, are naturally committed at chosen times, and in darkness and secrecy; and human tribunals must act upon such indications as the circumstances of the case present or admit, or society must be broken up. Nor is it very often that adequate evidence is not afforded by the attendant and surrounding facts, to remove all mystery, and to afford such a reasonable degree of certainty as men are daily accustomed to regard as sufficient in the most important concerns of life: to expect more would be equally needless and absurd. In *Burdett's* case² this subject underwent much discussion, and was elaborately treated by the bench. Mr. Justice Best said: "When one or more things are proved from which experience enables us to ascertain that another, not proved, must have happened, we presume that it did happen, as well in criminal as in civil cases. Nor is it necessary that the fact not proved should be established by irrefragable inference. It is enough if its existence is highly probable, particularly if the opposite party has it in his power to rebut it by evidence, and yet offers none; for then we have something like an admission that the presumption is just. It has been solemnly decided, that there is no difference between the rules of evidence in civil and criminal cases. If the rules of evidence prescribe the best course to get at the truth, they must be and are the same in all cases and in all civilized countries. There is scarcely a criminal case, from the highest down to the lowest, in which courts of justice do not act upon this principle." His lordship added: "It therefore appears to me quite absurd to state that we are not to act upon presumption. Until it pleases Providence to give us means beyond those our present faculties afford of knowing things done in secret, we must act on presumptive truth, or leave the worst crimes unpunished. I admit, where presumption is intended to be raised as to the *corpus delicti*, that it ought to be strong and cogent." Mr. Justice Holroyd said: "No man is to be convicted of any crime upon mere naked presumption. A light or rash presumption, not arising either necessarily, probably,

¹ *Smith v. Com.*, 21 Grat. (Va.) 809.

² 4 B. & Ald. 95.

or reasonably, from the facts proved, cannot avail in law. But crimes of the highest nature, more especially cases of murder, are established, and convictions and executions thereupon frequently take place for guilt most convincingly and conclusively proved, upon presumptive evidence only of the guilt of the party accused; and the well-being and security of society much depend upon the receiving and giving due effect to such proof. The presumptions arising from those proofs should, no doubt, and most especially in cases of great magnitude, be duly and correctly weighed. They stand only as proofs of the facts presumed till the contrary be proved, and those presumptions are either weaker or stronger, according as the party has, or is reasonably to be supposed to have, it in his power to produce other evidence to rebut or to weaken them, in case the fact so presumed be not true, and according as he does or does not produce such contrary evidence." Mr. Justice Bayley said: "No one can doubt that presumptions may be made in criminal as well as in civil cases. It is constantly the practice to act upon them, and I apprehend that more than one-half of the persons convicted of crimes are convicted on presumptive evidence. If a theft has been committed, and shortly afterwards the property is found in the possession of a person who can give no account of it, it is presumed that he is the thief, and so in other criminal cases; but the question always is, whether there are sufficient premises to warrant the conclusion." Lord Chief Justice Abbott said: "A fact must not be inferred without premises which will warrant the inference; but if no fact could be thus ascertained by inference in a court of law, very few offences would be brought to punishment. In a great proportion of trials, as they occur in practice, no direct proof that the party accused actually committed the crime is or can be given; the man who is charged with theft is rarely seen to break the house or take the goods; and in cases of murder, it rarely happens that the eye of any witness sees the fatal blow struck, or the poisonous ingredient poured into the cup." The law on this point was also very emphatically declared by Mr. Baron Parke in *Tawell's* case. His lordship said: "The jury had been properly told by the counsel for the prosecution that circumstantial evidence is the only evidence which can in cases of this kind lead to discovery. There is no way of investigating them ex-

cept by the use of circumstantial evidence ; but Providence has so ordered the affairs of men that it most frequently happens that great crimes committed in secret leave behind them some traces, or are accompanied by some circumstances which lead to the discovery and punishment of the offender ;¹ therefore, the law has wisely provided that you need not have, in cases of this kind, direct proof, that is, the proof of eye-witnesses, who see the fact and can depose to it upon their oaths.² It is impossible, however, not to say that is the best proof, if that proof is offered to you upon the testimony of men whose veracity you have no reason to doubt ; but on the other hand it is equally true with regard to circumstantial evidence, that the circumstances may often be so clearly proved, so closely connected with it, or leading to one result in conclusion, that the mind may be as well convinced as if it were proved by eye-witnesses. This being a case of circumstantial evidence ; I advise you," said the learned judge, " as I invariably advise juries, to act upon a rule that you are first to consider what facts are clearly, distinctly, indisputably proved to your satisfaction ; and you are to consider whether those facts are consistent with any other rational supposition than that the prisoner is guilty of that offence. If you think that the facts in this case are all consistent with the supposition that the prisoner is guilty, and can offer no resistance to that, except the character the prisoner has borne, and except the supposition that no man would be guilty of so atrocious a crime as that laid to the charge of the prisoner, that cannot much influence your minds ; for we all know that crimes are committed, and, therefore, the existence of the crime is no inconsistency with the other circumstances, if those circumstances lead to that result. The point for you to consider is, whether, attending to the evidence, you can reconcile the circumstances adduced in evidence with any other supposition than that he has been guilty of the offence. If you cannot, it is your bounden duty to find him guilty ; if you can, then you will give him the benefit of such supposition.

¹ " Ces circonstances sont autant de témoins muets, que la Providence semble avoir placés autour du crime, pour faire jaillir la lumière de l'ombre dans laquelle l'agent s'est efforcé d'ensevelir le fait principal ; elles sont comme un fanal qui éclaire l'esprit du juge, et le dirige vers des traces certaines qu'il suffit de suivre pour atteindre à la vérité."—Mittermaier, *ut supra*, ch. 58.

² 3 Greenl. on Ev. § 30.

All that can be required is, not absolute, positive proof, but such proof as convinces you that the crime has been made out.”¹

The same general principle prevails with regard to the proof of crimes of every description, and of every element of the *corpus delicti*. Thus, on the trial of a man for stealing pepper, it appeared that on the first floor of a warehouse a large quantity of pepper was kept in bulk, and that the prisoner was met coming out of the lower room of the warehouse where he had no business to be, having on him a quantity of pepper of the same description with that in the room above. On being stopped he threw down the pepper, and said, “I hope you will not be hard with me.” From the large quantity in the warehouse it could not be proved that any pepper had been taken from the bulk. It was urged on behalf of the prisoner that there must be direct and positive evidence of a *corpus delicti*, and that presumptive evidence was insufficient for that purpose; but the Court of Criminal Appeal held that the prisoner had been rightly convicted.² Mr. Justice Maule said that the offence with which the prisoner is charged must be proved, and that involves the necessity of proving that the prosecutor’s goods have been taken. But why, continued the learned judge, is that to be differently proved from the rest of the case? If the circumstances satisfy the jury, what rule is there which renders some more positive and direct proof necessary? And he mentioned the case of a father and two sons, who were convicted of stealing from their employers a quantity of shoes and materials for making shoes, though the prosecutors said their stock was so large that they could not say they had missed any one of the articles alleged to have been stolen.

In *Reg v. Mockford*,³ Cockburn, C. J., said: “Suppose a man is seen going away with a sack of corn from a barn where a quantity of corn is stored, and that he can give no account of it, and that the prosecutor cannot swear that he has lost a sack of corn, but only that he had a large quantity in the barn like that in the sack, can it be said there is no evidence of the sack of corn having been taken from the barn?” In this case the prisoner was tried for the theft of some fowls for his pos-

¹ *Reg. v. Tawell*, Aylesbury Spr. Ass., 1845.

² *Reg. v. Burton*, 23 L. J. N. S. M. C. 52. And see *Reg. v. Dredge*, 1 Cox, 285; and *ante*, 108.

³ 11 Cox C. C. 16.

session of which he gave no explanation. The prosecutor could not swear that he had lost any fowls. The prisoner was stopped by a constable about one o'clock in the morning, and threw down the fowls which he was carrying, bleeding and still warm, and ran towards his own house. He was tracked through freshly fallen snow to the prosecutor's fowl-house, where, on the floor, were found feathers corresponding to the feathers of one of the fowls which the prisoner had thrown away, from the neck of which feathers had been removed. The accused wore cord trousers on the knees of which was the wet dung of fowls. In the fowl-house were found, on the floor under the roosts, marks as if one wearing cord trousers had knelt there. The jury returned a verdict of guilty and the conviction was affirmed. Where a drayman was charged with the larceny of 190 pounds of coal, it appeared that in the discharge of his duty he was to deliver a ton of coal to a customer; that he delivered a ton of coal at one o'clock of the day in question, but that half an hour before he had sold 190 pounds of the same kind of coal to a witness. There was no evidence of the quantity of coal delivered at the customer's, nor of any coal being missed. The evidence was submitted to the jury and a verdict of "not guilty" was returned.¹ Where the prisoner, a booking-clerk for a steamship company, was indicted for having embezzled money of his employer's received from the sale of tickets, there was evidence that all of the tickets had passed into the prisoner's possession, and that they had passed out of his possession, but whether for money or not was unknown. There was also evidence that some of them had not been issued against warrants. In order to find the prisoner guilty it was necessary to prove that he had received money in behalf of his masters and that he had misappropriated it. "It is said," remarked Lord Coleridge, C. J., "that there was no such evidence; but it was conceded that if there was any evidence at all, it must have gone to the jury. Now how can it be said there was no evidence? That there was a receipt of money by the prisoner, it was said, is merely a presumption. It is difficult to conceive a case in which there can be only ocular demonstration; and if the contention on behalf of the prisoner were right, it would

¹ Reg. v. Hooper, 1 F. & F. 85.

always be possible, whenever ocular demonstration was wanting, to say that the inference the jury drew might have been wrong, and that if it was wrong, there was therefore no proof of the offence. But that is a fallacy, for it is for the jury to consider whether the inference they draw is correct or not. There are no facts here to show or raise an inference that money never passed into the prisoner's possession; and on the other hand, there are facts from which reasonable men might draw the presumption that money did pass. And the jury drew that presumption; and to say that it is mere presumption unsupported by evidence is a fallacy. The passage which was cited from Lord Stowell is extremely valuable as a piece of legal literature; but when it is cited in order to show that a clerk did not receive money for tickets he was bound to sell, is to mistake its application."¹

On the trial of an indictment for the larceny of a calf, it appeared that the defendant, after killing a calf, had cut out the brand, and cut off the ears, and had burned the ears and the part of the hide so cut out. The supposed owner of the animal could not testify that he had lost a calf. But the evidence was allowed to go to the jury for the purpose of determining "whether such calf was in fact stolen, and that the defendant was the thief."²

Where one was tried for the larceny of a sum of money, the only evidence in the case showed that the defendant was found in possession of money; that he had opportunity to steal it; that he was immediately afterward accused of the larceny, upon which he made false statements as to the manner in which the money was obtained; that when accused of the theft he claimed the money as his own, while on the trial he pretended that it had been confided to him for safe-keeping by the party who had lost it, a pretence inconsistent with the conduct of

¹ Reg. v. Stephens, 16 Cox C. C. 387. The passage from Lord Stowell, referred to by the Lord Chief Justice, is from Evans v. Evans, 1 Hagg. Con. 105: "When a criminal fact is ascertained presumptive proof may be taken to show who did it—to fix the criminal, having there an actual *corpus delicti*; but to take presumptive in order to swell an equivocal and ambiguous fact into a criminal fact would, I take it, be an entire misapprehension of the doctrine of presumption." See also State v. Cordelli, 19 Nev. 319, where it is said that language of this sort might apply where the proof of the crime is separable from the proofs which furnish a clew to the perpetrator thereof.

² State v. Loveless, 17 Nev. 424.

the parties on the day of the theft; that the defendant was seen to make motions as if attempting to pick the pocket of the one who subsequently lost the money. This was held sufficient to prove the *corpus delicti*, and to justify a verdict of guilty.¹

But it is not necessary that every individual fact should be indisputably proved. On a trial for forgery, in Scotland, Lord Meadowbank said: "I must tell you that the learned counsel for the panel stated the law incorrectly when he said that you must have decisive, irrefragable, and conclusive proof of every point in a case like the present, before finding the instrument to be forged. The law is quite the reverse. You are to take all the evidence together, and you are bound to consider whether it amounts and comes up to affording a moral conviction in your minds equivalent to the positive and direct proof of a fact."² Each particular circumstance need not be so established as to positively exclude all uncertainty or doubt; but all combined must produce that degree of certainty.³

¹ *People v. Walker*, 38 Mich. 156.

² *Reg. v. Humphreys*, *supra*.

³ *State v. Davidson*, 30 Vt. 377.

DIVISION II.

APPLICATION OF THE GENERAL PRINCIPLE TO PROOF OF THE CORPUS DELICTI IN CASES OF HOMICIDE.

CHAPTER I.

THE DISCOVERY OF THE BODY.

THE general principles of evidence under discussion are so supremely important in reference to cases of homicide, that it will be expedient to illustrate the application of them at some length.

The *corpus delicti* in murder is a compound fact made up of death as the result, and the criminal agency of another person as the means.¹ The former constitutes the basis of the latter inquiry and in general ought to be proved first.²

The discovery of the body necessarily affords the best evidence of the fact of death, and of the identity of the individual, and most frequently also of the cause of death.³ A conviction for murder is therefore never allowed to take place, unless the body has been found, or there is equivalent proof of death by circumstantial evidence leading directly to that result,⁴ and many cases have shown the danger of a contrary practice. Three persons were executed, in the year 1660, for the murder of a person who had suddenly disappeared,⁵ but about two

¹ *Ruloff v. People*, 18 N. Y. 179; *People v. Bennett*, 49 N. Y. 137; *Pitts v. State*, 43 Miss. 472; *Lovelady v. State*, 14 Tex. Crim. App. 545; *Smith v. Com.*, 21 Grat. (Va.) 809; *Thomas v. State*, 87 Ga. 460.

² *U. S. v. Williams*, 1 Cliff. 15.

³ *Mittermaier, ut supra*, ch. 24. See *Thomas v. State*, 67 Ga. 461.

⁴ Per Mr. Baron PARKE, in *Reg. v. Tawell, ut supra*. And see *State v. Miller*, 9 Houst. 564.

⁵ *Rex v. Perrys*, 14 St. Tr. 1812; and see 11 St. Tr. 463; see also the Scotch case of Green and others, 14 St. Tr. 1197, where, in 1705, the captain of a
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years afterwards he reappeared. It appeared that he had been out to collect his mistress's rents, and had been robbed by highwaymen, who put him on board a ship which was captured by Turkish pirates, by whom he was sold into slavery. Sir Matthew Hale mentioned a case where A. was long missing, and upon strong presumptions B. was supposed to have murdered him, and to have consumed the body to ashes in an oven, whereupon B. was indicted for murder, and convicted, and executed, and within one year afterwards A. returned, having been sent beyond sea by B. against his will; "and so," that learned writer adds, "though B. justly deserved death, yet he was really not guilty of that offence for which he suffered."¹ Sir Edward Coke also gives the case of a man who was executed for the murder of his niece, who was afterwards found to be living, of which the particulars have been given in a former part of this Essay.² Sir Matthew Hale, on account of these cases, says, "I will never convict any person of murder or manslaughter, unless the facts were proved to be done, or at least the body found."³ The judicial history of all nations, in all times, abounds with similar warnings and exemplifications of the danger of neglecting these salutary cautions.⁴

In Texas, by a provision of the Penal Code,⁵ no person can be convicted of homicide unless the body of the deceased or portions of it are found and sufficiently identified to establish the fact of the death of the person charged to have been killed. And in justification of this it is said that the occasional escape from punishment of a guilty party is preferable to the conviction of the innocent.⁶

In a famous case in New York,⁷ where the prisoner was indicted for the murder of his infant daughter, at the opening of the trial the counsel for the prosecution, in answer to a vessel and several of his crew were executed on a charge of piracy and murder; but the party supposed to have been murdered reappeared many years afterwards, having been taken at sea and carried into captivity.

¹ 2 Hale's P. C. c. 39.

² See *ante*; and for other cases of the same kind, see Green's Case, 14 St. Tr. 1311.

³ 2 P. C. c. 39.

⁴ See the case of the two Boorns, 1 Greenleaf's L. of Ev. § 214, and *ante*.

⁵ Art. 549.

⁶ *Puryea v. State*, 28 Tex. Cr. App. 73

⁷ *Ruloff v. People*, 18 N. Y. 179.

question by the prisoner's counsel, said that he did not propose to prove by any direct evidence that the child was dead, or had been murdered, or that her dead body had ever been found, but that he should ask the jury to infer from the lapse of time since the child and mother were last seen, and from other facts and circumstances, that the child was dead, and that she had been murdered by the prisoner. The prisoner's counsel thereupon moved that the trial be stopped for want of proof of the *corpus delicti*, insisting on the rule laid down by Lord Hale. The judge reserved the question till the evidence should be closed.

The proof offered by the prosecution tended to show that the prisoner did not live happily with his wife, and that on the evening of June 24, 1845, the wife and child were seen alive. But it was not shown that either were ever seen thereafter. The next day the accused borrowed a wagon, took into it a box from his own house, and drove off with it. On the following day he returned with the wagon and box. It was shown that he had in his possession a ring which his wife had worn on the day when she was last seen, and a shawl and other articles of her apparel; that he told stories as to her being at sundry places where she was proved not to have been, and generally conducted himself in such a way as to lead strongly to the inference that he was the author of whatever had happened to his wife and child, if anything had, in fact, happened to them. In the house clothes were found lying about in disorder; and dishes were unwashed. A cast-iron mortar and flat-irons which were known to have been in the prisoner's possession were not to be found. About a month after the disappearance of his wife and child, the prisoner went to a distant city, where he lived under a false name, and where he said that his wife and child had died six weeks before in Illinois. He left there a box of books, papers, and articles of woman's apparel which had belonged to his wife, and a scrap of paper on which were the words, "Oh, that dreadful hour!"

At the close of the evidence counsel for the prisoner renewed his motion and asked that the jury be instructed that no conviction could be had. The judge refused so to instruct, and the case was taken up on a writ of error. It was held that an acquittal should have been directed, Chief Justice

Johnston, who delivered the opinion of the court, saying: "I have not found any case in which a judge, speaking directly to the point here involved, has said that without direct evidence in either branch of the *corpus delicti* a conviction for murder could be allowed." It was said in a later case¹ that all that was decided in this case was that one or the other of the component parts of the *corpus delicti* must be proved by direct evidence. And this is the law of New York;² for by the Code of Criminal Procedure³ of that State "no person can be convicted of murder or manslaughter unless the death of the person alleged to have been killed, and the fact of killing by the defendant, as alleged, are each established as independent facts, the former by direct proof, and the latter beyond a reasonable doubt."

But with regard to the statement of Sir Matthew Hale quoted on a previous page, Fitzgerald, J., said that the "rule, which is one rather of judicial practice than part of the law of evidence, seems to have had its origin in cases where the charge of murder depended on the fact of the disappearance of the party alleged to have been murdered.⁴ And it is evident that to require the discovery of the body in all cases would be unreasonable and lead to absurdity and injustice, and it is indeed frequently rendered impossible by the act of the offender himself. It is said that on the trial for murder of the mother and reputed father of a bastard child, whom they had stripped and thrown into the dock of a seaport town, after which it was never seen again, Mr. Justice Gould advised an acquittal on the ground that as the tide of the sea flowed and reflowed into and out of the dock it might possibly have carried out the living infant.⁵ Mr. Justice Story said of the proposition in question that "it certainly cannot be admitted as correct in point of common reason or of law, unless courts of justice are to establish a positive rule to screen persons from punishment who may be guilty of the most flagitious offences. In the cases of murder committed on the high seas the body is rarely if ever found, and a more complete encouragement and protection to the worst offences of this sort could not be invented

¹ *People v. Bennett*, *supra*.

² *People v. Palmer*, 109 N. Y. 110.

³ § 181. And see *People v. Beckwith*, 108 N. Y. 67.

⁴ *Reg. v. Unkles*, 8 Ir. L. T. R. 38.

⁵ Per GARROW *arguendo* in *Hindmarsh's Case*, 2 Leach's C. C. 371.

than a rule of this strictness. It would amount to a universal condonation of all murders committed on the high seas.”¹ In the case of *United States v. Williams*,² the defendants were indicted for murder on the high seas. The prisoners and the men supposed to have been murdered made up the crew of a vessel which sailed from Portland about the middle of the year 1857. Neither the vessel nor the murdered men were ever afterward heard from, except through the confessions of the prisoners and L., who died before the trial. About the time when the vessel should have reached its destination the prisoners were picked up in a boat in the open sea, which boat was subsequently brought home and identified as the only boat of the vessel in which they sailed. It was tarred inside in a manner to indicate that they had not left the vessel without preparation, and that fact was still more strongly indicated by the circumstance that they had in the boat the ship’s compass and a supply of water and provisions. They had also in their possession the watch of the captain and the clothing of the murdered men, and the ship’s register, and all these articles were fully identified at the trial. After they were picked up they gave contradictory and false accounts of what had occurred before they left the vessel, and persisted in falsehood until L. disclosed the truth; and then they freely confessed their crimes.

It may be said to be now clearly established that the fact of death may be legally inferred from such strong and unequivocal circumstances of presumption as render it morally certain, and leave no ground for reasonable doubt; as where, on the trial of a mariner for the murder of his captain at sea, a witness stated that the prisoner had proposed to kill him, and that, being alarmed in the night by a violent noise, he went upon deck and saw the prisoner throw the captain overboard, and that he was not seen or heard of afterwards, and that near the place on the deck where the captain was, a billet of wood was found, and that the deck and part of the prisoner’s dress were stained with blood. It was urged that, as there were many vessels near the place where the transaction was alleged to have occurred, the probability was that the party had been taken up by some of them and was then alive; but the court,

¹ *United States v. Gilbert*, 2 Sumner, 19.

² 1 Cliff. 5.

though it admitted the general rule of law, left it to the jury to say upon the evidence, whether the deceased was not killed before the body was cast into the sea, and the jury being of that opinion, the prisoner was convicted and executed;¹ but it is not easy to perceive why the natural presumption from these facts should have been thus restricted to a presumption that the party had been killed before he was thrown overboard. And in a case much like the above a witness was allowed to testify, as telling against the theory that the person thrown overboard had been picked up by a passing vessel, that for several days before and after the alleged crime no vessels were seen in the neighborhood.² The proposition is sustained by a case where a body was seen in the flames of a burning house. The fact that the accused was seen to watch it intently was regarded as of peculiar significance. It appeared on the trial that the accused had for some time tried to form a conspiracy to rob the deceased.³

The rule and its qualifications are well exemplified by the case of Elizabeth Ross, who was tried for the murder of Caroline Walsh. The deceased had been repeatedly solicited by the prisoner to live with her and her husband, but had refused. However, she at last consented, and went for that purpose to the prisoner's lodgings, in Goodman's Fields, in the evening of the 19th of August, 1831, taking with her her bed and an old basket, in which she was accustomed to carry tape and other articles for sale. Notwithstanding all inquiry, from that evening all traces of the deceased were lost, and when the prisoner was required by her relatives to account for her disappearance she prevaricated, but finally asserted that she had gone out early in the morning of the next day, and had not returned. Many circumstances confirmed their suspicions that she had been murdered, and in the month of October the prisoner was apprehended, and charged with the murder of the old woman. From the testimony of the prisoner's son, a boy of twelve years of age, it appeared that she had suffocated the deceased

¹ *Rex v. Hindmarsh*, 2 Leach C. C. 648.

² *St. Clair v. United States*, 154 U. S. 184.

³ *Stocking v. State*, 7 Ind. 326. See also *Gray v. Com.*, 101 Pa. St. 380; 40 Leg. Int. 90; 27 Albany Law Journal, 183, where it was said by the court, "All the law requires is that the *corpus delicti* shall be proved as any other fact that is beyond a reasonable doubt, and that doubt is for the jury."

on the evening of her arrival, by placing her hands over her mouth, and pressing on her chest; and he deposed that the following morning he saw the dead body in the cellar of the house, and that in the evening he saw his mother leave the house with something large and heavy in a sack. A medical man deposed that the means described would be sufficient to cause death. It happened most singularly that on the evening of the day following that of the alleged murder, an old woman was found lying in the street in the immediate neighborhood, in a completely exhausted condition, and in a most filthy and squalid state. On being questioned she stated that her name was Caroline Welsh, and that she was a native of Ireland. Her hip was found to be fractured, in consequence of which she was conveyed to the London Hospital, where she subsequently died. The prisoner when apprehended insisted that this was the female whom she was accused of having murdered. The resemblance of names and the coincidence of time were very remarkable, but by the examination of numerous witnesses the following points of difference were established: They were both Irish women; but Caroline Walsh came from Kilkenny; Caroline Welsh from Waterford. Walsh was eighty-four years of age, tall, of a sallow complexion, gray hair, and had very perfect incisor teeth in both jaws, having lost only a side-tooth in the upper and lower jaws from the effect of continual smoking with a tobacco-pipe. Welsh (the woman who died in the hospital) was about sixty years of age, tall, dark, like a mulatto, but had no front teeth, and the alveolar cavities corresponding to them had been obliterated for a considerable time. Walsh was healthy, cleanly, and neat in her person, and her feet were perfectly sound; Welsh was considerably emaciated; in a dirty and filthy condition; her hip broken, her feet covered with bunions and excrescences, and the toes overlapped one another. The two women were differently dressed: Walsh was dressed in a black stuff gown, a broken old willow bonnet, and a faded blue shawl with a broad border; Welsh wore a striped blue cotton gown, a dark or black silk bonnet, and a snuff-colored shawl with little or no border. Walsh's clothing was proved to have been sold by the prisoner to different persons, and almost every article was produced in court and identified. The clothes of Welsh, on account of their disgusting condition, had been

burnt by order of the parish authorities. Both of these women had similar baskets; that of Walsh had no lid or cover, while that found on Welsh had. Lastly, the body of the latter was taken up from the burial-ground of the London Hospital for the purpose of identification, and it was sworn by two of the granddaughters of Walsh not to be the body of their grandmother. The prisoner was convicted and executed.¹ The corpse of the murdered woman was most probably sold by the prisoner for the purpose of dissection; and other murders were committed about the same time, both in England and Scotland, from the same motive.²

Touching the matter under discussion a learned judge has lately said: "It seems to me that there is no definite universal rule of law on the subject, that there are no established definitions of direct evidence and presumptive evidence according to which the former kind is to be deemed indispensable, the latter kind insufficient, to establish a *corpus delicti*, and that the so-called rule on the subject is no more than a prudential motive fit to be enounced by a judge for the purpose of assisting a jury in the discharge of their duties, and warning them that the fact of the crime itself, the unlawful act, ought to be established by sufficient evidence—that is, evidence not inadmissible by some rule of law which leaves no reasonable doubt in their minds that the crime was committed by somebody."³ In this case the accused was charged with the murder of his illegitimate child. The defendant had, during the pregnancy of the mother, concealed her from her relatives while the latter were visiting the house, and he had, before the birth of the child, threatened to smother it. He was present at the birth of the child, and directly after delivery took the child from the house, and it was never more seen. It was also shown that he threatened to shoot the mother if she made any mention of the child.⁴

¹ R. v. Ross, O. B. Sess. Pap., 1831.

² Rex v. Burke, Alison, *ut supra*, Syme's Jud. Rep. 845; Rex v. Bishop and others, O. B. Sess. Pap., 1832.

³ JOHNSON, J., in Reg. v. Woodgate, 2 New Zea. Jur. N. S. 5. See also 10 Cent. L. J. 165.

⁴ See summary of this case in an article on *corpus delicti*, 10 Cent. L. J. 164.

CHAPTER II.

THE IDENTIFICATION OF THE BODY.

It is another necessary step in the establishment of the *corpus delicti* in cases of homicide, that the body, when discovered, be satisfactorily identified as that of the person whose death is the subject of inquiry.¹ Mr. Justice Park stopped the trial of a woman, charged with the murder of her illegitimate child, because the supposed body was nothing but a mass of corruption, so that there were no lineaments of the human face, and it was impossible even to distinguish its sex.² On the trial of a woman for murder of her brother, a child eight years of age, by poison, the sexton proved the interment, on the 29th of June, and the exhumation on the 12th of August following, of a body which he believed to be that of the deceased, from the coffin-plate, and the place from which he had exhumed it, but he had not seen the body in the coffin at the time of interment, and could not recognize it independently of those circumstances, on account of its state of decay. Mr. Baron Maule refused to receive evidence of the contents of the coffin-plate, on the ground that, being removable, it ought to have been produced, and there being no other evidence of identity, stopped the case.³ On the trial of a girl for the murder of her illegitimate child, it appeared that she was proceeding from Bristol to Llandago, and was seen near Tintern at six o'clock in the evening, with the child in her arms, and that she arrived at Llandago between eight and nine without it, and that the body of a child was afterwards found in the river Wye near Tintern, but which appeared from circumstances not to be the prisoner's child; Lord Abinger held that the prisoner could not be called upon to account for her child, or to say where it was, unless there

¹ *Thomas v. State*, 67 Ga. 460; *Reg. v. Cheverton*, 2 F. & F. 883.

² Mr. Justice PARK's charge to the grand jury in *Rex v. Thurtell*, Hertford Winter Assizes, 1824; *Reg. v. Edge*, *ante*.

³ *Reg. v. Edge*, *ante*; and see *Reg. v. Henley*, 1 Cox C. C. 112.

was evidence to show that her child was actually dead; the jury were not sitting, he said, to inquire what the prisoner had done with her child, which might be then alive and well.¹ In a similar case Mr. Baron Bramwell observed that the evidence of identity was not complete; that still, if the jury thought there was reasonable evidence upon the point, they might think that if the child was still alive the prisoner would probably produce it in a case where her life was at stake, but that she was at liberty to act upon the defect of proof, and to say that the prosecutor had failed to prove the identity.²

In *Smith's* case the prisoner was indicted for the murder of the infant child of one Harriet Ferguson. Harriet Ferguson, a white woman, was a chambermaid in a hotel in Alexandria, and the prisoner was a servant in the same hotel. The woman on the 4th of December gave birth to a female mulatto child. The prisoner was a mulatto and acknowledged that he was the father of the child. On the 7th of December the child was delivered to the prisoner by the mother of Harriet Ferguson, she saying that the child's mother was not able to provide for it, and that her other daughters were unwilling that it should remain in the house. The prisoner stated that he would have it raised by his mother, who lived six or eight miles in the country. The child, when delivered to the prisoner, was alive and healthy, and had on at the time a flannel petticoat, a slip, a shirt, and was wrapped in a shawl. About the 16th of December the body of a female mulatto child was found in a pond of water in the southeastern portion of the city, in the neighborhood of a shipyard, and near the bank of the Potomac River. The child had nothing on it but a shirt and a band around its body. The physician who made the *post mortem* examination expressed the opinion that the child found was born alive and came to its death by drowning, and also expressed the opinion that the child found was between one and six days old at the time of its death. But there was no evidence in the case as to how long the child so found had been dead. The child found in the pond was described as a *mulatto*, while the child of Harriet Ferguson was a *bright mulatto*. The child delivered to the prisoner was dressed differently from the child found in the pond. No proof was offered to show how

¹ Reg. v. Hopkins, 8 C. & P. 591.

² Reg. v. Rudge Hereford Summer Ass., 1857.

long the body of a child would be kept in a good state of preservation in December weather, and under the circumstances in which the body was found. So for anything that appeared the child found might have been dead before the other was born.

About the 21st of December, the physician who attended Harriet Ferguson at the delivery of her child, called on a magistrate and gave him the name of the prisoner, who had admitted to being the father of the child. The magistrate having caused the prisoner to be brought to his office, told him he knew all about the child having been delivered to him, and asked him what had become of it. The prisoner answered that he had taken the child to his mother's and that a woman who lived near his mother was nursing it. The magistrate then told the prisoner to produce his mother, or the child, or the nurse, at his office the next morning and dismissed him. The next evening the prisoner returned, saying that he could not bring the child, that he had not been to his mother's. The magistrate then told him that he was afraid that the child found near the ship yard was the one in question, and asked him what had made him do such a thing. The prisoner replied that he did not know why he did it; that he hardly knew what he was doing. He was then asked what had made him take the clothing off the child, to which he replied: "Do you think I would strip the poor little thing?" The magistrate then asked him where the shawl was in which the child was wrapped. The prisoner having replied that it was in the room of a servant of the hotel under the bed, it was brought and identified as the same shawl which was wrapped around the child when delivered to the prisoner. The court said that, "there being no direct proof that the body found was the infant child of Harriet Ferguson, if the prisoner's confession was to be relied upon to prove that fact, it ought to be certain that what he said was intended as an admission that the body found was the same child which had been delivered to him." And as to the force of these admissions by the prisoner, Christian, J., said: "Certainly these admissions must produce a strong suspicion against the accused; but we cannot say, as the court below, which heard all the evidence, could not say, that there was an admission, on the part of the accused, that the child found was the child of Harriet Ferguson, charged in the in-

dictment with having been murdered. In the absence of proof that the body of the infant found was the same as charged in the indictment, the confessions of the prisoner must be distinct and specific before we can say that upon his confession the *corpus delicti* is made out; or, in other words, that the child found was the same which was born of Harriet Ferguson, charged in the indictment as murdered by the prisoner. His reply to the magistrate's question, 'What induced you to do such a thing?' that he did not know why he did it, that he hardly knew what he was doing, was not construed by the court below into an admission that he had murdered the child delivered to him, or that the child found was the same delivered to him. His reply may have had reference to his criminal intercourse with the mother of the child, who was a white woman—he being a negro servant—or to the fact that he had received the child and delivered it to the woman with whom he said he left it for a few days before he was to carry it to his mother. His indignant denial to the magistrate that he had stripped the clothing off the child is inconsistent with the theory that his other declaration was intended as a confession that the child was the same."¹

Where the accused was indicted for the murder, by drowning, of her infant child, her statement was that the child's father had written for it and that she had sent it to him by one going by rail. The only other evidence was, that on the evening when it was alleged that the child was drowned, the accused had been seen going in a direction which led either to the river or to the station, carrying something which seemed like a child of about the age of the missing one, and that on the next morning the body of a child of the same sex, and apparently of about the same age, was found dead in the river. The jury were not satisfied of the identity of the child, and returned a verdict of not guilty.² On an indictment for the murder of one S., a body much decomposed was found concealed in the bed of a small creek one month after S. was last seen alive in company with the defendant. Several articles of clothing found on the body were identified by several witnesses as belonging to S., but another witness denied that the clothing, though resembling in color that of S., belonged to

¹ Com. v. Smith, 21 Grat. 809.

² Reg. v. Cheverton, 2 F. & F. 888.

him. The defendant when arrested had in his possession a small sorrel horse resembling one which had belonged to S. But a witness testified that the accused and S. had traded horses a few days before the disappearance of S. Several physicians testified that it would take at least three months for a body to reach the advanced stage of decomposition in which this was when found. The identity of the body was held not to have been sufficiently made out, and the judgment of conviction was reversed.¹

But, nevertheless, it is not necessary that the remains should be identified by direct and positive evidence, where such proof is impracticable, and especially if it has been rendered so by the act of the party accused. The dead body may be identified as that of the person charged to have been murdered by the same character of proof as may establish the identity of the person killing, or the homicide itself.² In New York the *corpus delicti* having been made out, the identity of the victim may be established by circumstantial evidence. This rule of the common law has not been changed by the provision of the New York Penal Code heretofore cited.³

The identification of human remains has been many times facilitated by the preservation of the head and other parts in spirits;⁴ by the anti-putrescent action of the substances used to destroy life; by the similarity of the undigested remains of food found in the stomach, with the food which it has been known that the party has eaten;⁵ by means of clothing or other articles of the deceased traced to the possession of the prisoner, and unexplained by any evidence that he became innocently possessed of them;⁶ by means of artificial teeth,⁷ and numerous other mechanical coincidences. In a case cited heretofore on this page, there was no direct proof of the identity of the body found; but the father recognized it as the body of his son by a minute description which was detailed to him while on the stand. He recognized the clothing, hat, and other

¹ Monk v. State, 27 Tex. Crim. App. 450; 11 S. W. 460.

² Taylor v. State, 3 Tex. Crim. App. 97; McCullough v. State, 48 Ind. 109; Reg. v. Cheverton, 2 F. & F. 833.

³ N. Y. Pen. Code, § 181. See People v. Palmer, 109 N. Y. 110.

⁴ Rex v. Hayes et al., 3 Par. & F. 73.

⁵ Rex v. McDougal, Burnett's C. L. of Scotland, 540.

⁶ Rex v. Ross, ante; Reg. v. Good, Sess. Pap., May, 1842.

⁷ Reg. v. Manning, and Webster's Case, supra.

articles found near the body. Papers found on the body had been given a short time previous to a person bearing the name charged in the indictment; and property found in the possession of the defendant was proved to have belonged to the person charged to have been murdered.¹ The remains of a man which had lain undiscovered upwards of twenty-three years, were identified by his surviving widow from peculiarities in the teeth and skull, and from a carpenter's rule found with them.²

In a recent case in Pennsylvania—a trial for murder—it appeared that the deceased had eaten breakfast with her son about eight o'clock on a morning of February, 1877, and that she had disappeared before four o'clock in the afternoon of the same day, when the son returned from school, and that she was never more seen. The evidence considered sufficient to establish the identity of the deceased and prove the *corpus delicti* is given in the language of the court: "On the 4th of April, 1878, a human skull was found on the river shore, near the house in which Mrs. McCready lived. The hair attached to the skull was evidently that of a woman; it was black and gray, corresponding to the hair shown to have belonged to her. The skull showed marks of violence; there were two wounds, either of which would be sufficient to produce death. The jaw-bone found near the skull was identified by two witnesses as the jaw-bone of the deceased, by reason of certain peculiarities which they described."³

The prosecution is entitled to exhibit the clothing worn by the deceased for the purpose of identifying the body.⁴ And to assist in identification, the age, size,⁵ and color of hair of the missing man may be shown.⁶ In one case, after it had been shown that in these particulars the body found resembled the alleged murdered man, a dentist was introduced as a witness and permitted to testify that he had extracted certain teeth from the mouth of the alleged murdered man, and that he had noticed peculiar marks upon those remaining, and that the same teeth were missing from the jaw of the body found, and

¹ Taylor v. State, *supra*.

² Rex v. Clewes, Worcester Spr. Ass., 1880.

³ Gray v. Com., 101 Pa. St. 380; 40 Leg. Int. 90.

⁴ Early v. State, 9 Tex. Crim. App. 476.

⁵ McGill v. State, 25 Tex. Cr. App. 499 ⁶ Marion v. State, 20 Neb. 233.

that the same marks were on the remaining teeth.¹ The body of the lamented Prince Imperial, who was killed in South Africa a few years ago, was stripped of clothing, and so mutilated that identification was almost entirely dependent on peculiarities of the teeth. And one of the witnesses introduced to identify the body found in the sewer in Chicago as that of Dr. Cronin was a dentist, who recognized work that he had done in the mouth of the missing man. A man was convicted of the murder of a creditor who had called to obtain payment of a debt, and whose body he had cut into pieces and attempted to dispose of by burning; the effluvium and other circumstances alarmed the neighbors, and a portion of the body remained unconsumed, sufficient to prove that it was that of a male adult; and various articles which had belonged to the deceased were found on the person of the prisoner, who was apprehended putting off from the Black Rock at Liverpool, after having ineffectually endeavored to elude justice by drowning himself.² A sailor was charged with the murder on ship-board of the captain and mate of a vessel while the vessel was lying at anchor in Long Island Sound. The vessel was sunk shortly after the supposed murder. It did not appear that there was any one on board of the vessel on the evening of the murder except the captain and mate and the prisoner. The prisoner left the vessel in a sinking condition on the evening following the murder, and was arrested as he landed on the shore. In his possession was found property belonging to captain and mate. Neither of the bodies was immediately recovered. But about six months afterwards a body was washed ashore which bore a very striking resemblance to that of the missing captain; but being in an advanced stage of decomposition it could not be distinctly identified. The jury were however satisfied and the prisoner was convicted.³

On the trial of a Chinaman for the murder of his employer, it was shown that the house where the dead body was found was used as a Chinese wash-house; that Ah Long, the alleged deceased, was the proprietor; that he was assisted in the business by two other Chinamen; that these three were usually at

¹ *Lindsay v. People*, 63 N. Y. 143.

² *Rex v. Cook*, Leicester Summer Ass., 1884.

³ *People v. Wilson*, 3 Park. Cr. R. 199.

the house; that the wash-house was being used as usual on the day of the homicide; that some human being therein was killed; that the house was burnt after the homicide occurred; that the body found was badly charred by the fire; that Ah Long had never been seen after the fire; and that the other occupants had been seen alive. The jury considered the fact of identity established, and the Supreme Court declined to disturb the verdict.¹

Some charred bones of a human being were found in the ashes of a log pile, and in a creek and among the bones were found some peculiar hair-pins. For the purpose of identifying the bones as part of the remains of one Peggy Joly, evidence was admitted to the effect that the supposed deceased had, two years before, worn such pins.²

In a case where the evidence tended to show that the prisoners had shot the alleged deceased person and killed him in order to get possession of his property; that the person alleged to have been killed was never afterwards seen; that on the night in which the murder was supposed to have been committed the prisoners built a large fire, and were seen watching it, and that subsequently some bones were found in the fire too fragmentary to be identified as human bones, this was held sufficient to establish the *corpus delicti*.³

Photographs may be introduced in evidence for the purpose of facilitating identification.⁴ A witness, unacquainted with the deceased, having seen the dead body, testified to having seen the deceased alive at a certain saloon at a time subsequent to the time when, according to the theory of the prosecution, he was killed by the defendant. Being cross-examined, he selected a photograph which he said resembled the man he had seen in the saloon. This was a picture of the brother of the deceased. The State then offered in rebuttal a photograph of the deceased which bore no resemblance to the other. This was held admissible to weaken the force of the testimony.⁵ In a somewhat celebrated case⁶ a mutilated body whose face was discolored and swollen was discovered, after having been buried, apparently, for some days. The witness who found it

¹ State v. Ab Chuey, 14 Nev. 79.

² State v. Williams, 7 Jones' L. 446.

³ People v. Alviso, 55 Cal. 280.

⁴ Beavers v. State, 58 Ind. 580.

⁵ State v. Holden, 42 Minn. 850.

⁶ Udderzook v. Com. (Pa.), 26 P. F. S. 340.

had never seen the person before. But he was allowed to testify that the face resembled a photograph of a person alleged to be the one found. The question whether he could identify it was for the jury.¹

¹ And see *Gray v. Com.*, 101 Pa. St. 380.

CHAPTER III.

THE CAUSE OF DEATH.

It sometimes happens that a person determined on self-destruction resorts to expedients to conceal his guilt, that his memory may be saved from dishonor. And instances have been known where, in doubtful cases, the relatives of the deceased have used great exertions to rescue his character from ignominy by substantiating a charge of murder.¹ On the other hand, in frequent instances, attempts have been made by those who have really been guilty of murder to perpetrate it in such a manner as to induce a belief that the party had died by his own intentional act.

Accident and natural causes are also frequently suggested and plausibly urged as the causes of death, where the pretence cannot receive direct contradiction, and where the truth can be ascertained only by a comparison of all the attendant circumstances; some of which, if the defence be false, are commonly found to be irreconcilable with the cause alleged. Where the circumstances are natural and real, observes Roscoe,² and have not been counterfeited with a view to evidence, they must necessarily correspond and agree with each other, for they really so co-exist, and therefore if any one circumstance, which is essential to the case attempted to be established, be wholly inconsistent and irreconcilable with such other circumstances as are known or admitted to be true, a plain and certain inference results that fraud and artifice have been resorted to, and that the hypothesis to which such a circumstance is essential cannot be true. In the proof of criminal homicide the true cause of death must therefore be clearly

¹ *Rex v. Cowper*, 13 How. St. Tr. 1106. And see 2 Roscoe Cr. Ev. (8th Am. Ed.) 988; *Stark. Ev.* (10th Am. Ed.) 863.

² Roscoe's Cr. Ev. (8th Am. Ed.) 938, quoting from 2 *Stark. Ev.* (2d Ed.) 521.

established, and the possibility of accounting for the event by self-inflicted violence, accident, or natural causes excluded; and only when it has been irrefragably proved that no other hypothesis will explain all the conditions of the case, can it be safely and justly concluded that it has been caused by intentional injury.¹ In the case of *Spencer Cowper*, tried for the alleged murder of Sarah Stout, it was doubtful whether the deceased, who was found with her head under water, had been drowned by another, or had committed suicide, or whether her death was caused by violence previous to the immersion, and the accused was acquitted.² Where on a trial for murder it was wholly uncertain whether the death of the deceased was brought about by blows inflicted by another, or by an accidental fall into an open hearth and the burns resulting therefrom, the *corpus delicti* was considered not to be established and no conviction could be had.³ In a recent case in Georgia a woman was tried and convicted for the alleged murder of her child. The evidence showed that shortly after she had been delivered of the child, it was found about 300 yards from the house under a buggy. It was returned to its mother, and was at that time alive and in a healthy condition. The next morning it was dead. There were no marks of violence on it, and the physician could not say whether it died from exposure or had been smothered. It might have died from natural causes. This evidence was sufficient to raise at most a suspicion, and was inadequate to sustain the assertion that the child had been murdered, and the judgment of conviction was reversed.⁴

The case of *James Harris*, given in the Theory of Presumptive Proof,⁵ well illustrates the importance of closely observing the rule just laid down. Harris, an innkeeper, was tried and convicted for the murder of one Grey, who stopped at the inn over night. Morgan, a servant at the inn, swore that his master had strangled Grey while pretending to assist the latter, who was in a fit, and that he had afterwards rifled the pockets of the dead man. Harris, in great indignation, repudiated the

¹ *Lee v. State*, 76 Ga. 498.

² *Rex v. Cooper*, 18 How. St. Tr. 1106. See 2 Roscoe's Cr. Ev. (8th Am. Ed.) 939; Stark. Ev. (10th Am. Ed.) 863.

³ *Lovelady v. State*, 14 Tex. Crim. App. 545.

⁴ *Lee v. State*, *supra*.

⁵ See Phillips' Famous Cases of Circumstantial Evidence (4th Ed.), 1879.

charge, and threatened a prosecution for perjury. Thereupon, a woman who was also employed in the inn came and testified that she had seen her master clandestinely burying some gold. The spot which she pointed out was examined and gold found. After his execution the real facts became known in this way : Morgan and the woman were engaged to be married, but having quarrelled the truth came out. Morgan had, some time before the visit of Grey to the inn, threatened vengeance on his master for a blow and took advantage of this occasion to gratify his hate. The woman had actually seen Harris concealing money in the place pointed out, and had agreed with her lover that, as soon as the hoard had reached a certain sum, they would purloin it. The threat of Harris to prosecute her lover for perjury determined her to take the step which she did, and to give a false appearance to an innocent fact. Grey had died in an apoplectic fit.

But in accordance with the principles which govern the proof of every other element of the *corpus delicti*, it is not necessary that the cause of death should be verified by direct and positive evidence ; it is sufficient if it be proved by circumstantial evidence which produces a moral conviction in the minds of the jury, equivalent to that which is the result of positive and direct evidence.¹

There is failure of proof where the circumstances relied on to prove that death was caused by the criminal act of a person other than the deceased are consistent with the theory that death was produced by natural causes.²

It was said in one case that the body found and identified with the throat cut, and the fact that there was no sign of suicide or accident, are ample to prove the *corpus delicti*.³

Evidence of the death and identity of the persons alleged to have been murdered, and that they came to their death by drowning, is sufficient proof of the *corpus delicti*.⁴

On a prosecution for wife murder, the fact that the death was caused by human agency, and was not suicide, is sufficiently established by the fact that the body was found in a cow-pen with a skull-wound about the size of a silver dollar,

¹ See the language of Lord MEADOWBANK, in Reg. v. Humphreys, Swinton's Rep. 815.

² Dreesen v. State, 38 Neb. 375.

³ Thomas v. State, 67 Ga. 460.

⁴ Nicholas v. Com. (Va.), 21 S. E. 364.

and that a blow had driven that portion of the skull directly in upon the brain, and that the throat and neck of deceased were scratched and black.¹

In a prosecution for manslaughter by procuring an abortion, it was held that the *corpus delicti* might be established not only by the *post-mortem*, but also by the fact of the pregnancy, illness, and treatment of the accused, by whom she was treated, and her condition generally to the time of her death. And it was said that a history of her illness from the beginning to the end, in detail, was perfectly legitimate to prove the *corpus delicti*; and that what the defendant said and did in connection with such illness while attending upon the sick girl was properly a part of such history.²

A young woman who had borne a child to him was taken by her seducer from her father's house, under the pretence of conveying her to Ipswich to be married. The prisoner having represented that the parish officers meant to apprehend the deceased, she left her house on the 18th of May in disguise, a bag containing her own clothes having been taken by the prisoner to a barn belonging to his mother, where it was agreed that she should change her dress. The deceased was never heard of afterwards; and the various and contradictory accounts given of her by the prisoner having excited suspicions, which were confirmed by other circumstances, it was ultimately determined to search the barn, where, on the 19th of April, after an interval of nearly twelve months, the body of a female was found, which was clearly identified as that of the deceased. A handkerchief was drawn tight around the neck, and a wound from a pistol-ball was traced through the left cheek, passing out of the right orbit; and three other wounds were found, all of which had been made by a sharp instrument, and one of which had entered the heart. The prisoner, who in the interval had removed from the neighborhood, upon his apprehension denied all knowledge of the deceased; but in his defence he admitted the identity of the remains, and alleged that an altercation took place between them at the barn, in consequence of which, and of the violence of temper exhibited by the deceased, he expressed his determination not to marry her, and left the barn; but that im-

¹ *Melcik v. State* (Tex. Crim. App.), 24 S. W. 417.

² *People v. Aikin*, 66 Mich. 460.

mediately afterwards he heard the report of a pistol, and going back found the deceased on the ground apparently dead; and that, alarmed by the situation in which he found himself, he formed the determination of burying the corpse, and accounting for her absence as well as he could. But the variety of the means and instruments employed to produce death, some of them unusual with females, in connection with the contradictory statements made by the prisoner to account for the absence of the deceased, entirely discredited the account set up by him. He afterwards made a full confession, and was executed pursuant to his sentence.¹

But these heads of evidence belong rather to the department of medical jurisprudence. Such auxiliary evidence is frequently of the highest value in demonstrating the falsehood and impossibility of the alleged defence; but when uncorroborated by conclusive moral circumstances, it must be received with a certain amount of circumspection and reserve, of the necessity of which some striking illustrations have occurred in other parts of this volume. These preliminary considerations naturally lead to the application of them to the proof of the *corpus delicti* in some special cases of great importance and interest.

¹ *Rex v. Corder*, Bury St. Edmunds Summ. Ass.

DIVISION III.

APPLICATION OF THE GENERAL PRINCIPLES TO PROOF OF THE CORPUS DELICTI IN CASES OF POISONING.

CHAPTER I.

THE CAUSE OF DEATH.

Among the most important grounds upon which the proof of criminal poisoning commonly rests are, the symptoms during life, and *post-mortem* appearances; but these subjects belong to another department of science, and have only an incidental connection with the subject of this treatise. As is the case with regard to all other questions of science, courts of justice must derive their knowledge from the testimony of persons who have made them the objects of their special study, applying to the *data* thus obtained those principles of interpretation and judgment which constitute the tests of truth in all other cases.¹

An expert chemist has been held to be a proper witness to testify as to the effect of various poisons in the system, and the fatal dose.² But where an undertaker was allowed to testify as an expert, as to the improbability of an injection of arsenic after death being retained, the learned judge in reviewing the case said that the undertaker "presented no claims entitling him to give an opinion as a scientific expert, and his testimony was improper so far as it related to anything but specific facts."³

¹ For a valuable Essay on Circumstantial Evidence in Poisoning Cases, by Prof. John H. Wigmore, see *Medico-Legal Journal*, Dec. 1888, p. 292.

² *State v. Cook*, 17 Kan. 392.

³ *People v. Millard*, 58 Mich. 63.

The first thing necessary is to determine the cause of death.¹

It is obviously essential in order to secure a conviction on a trial for criminal poisoning, that the particular symptoms and *post-mortem* appearances should be shown to be not incompatible with the hypothesis of death from poison.² In general such appearances are inconclusive, since though they are commonly characteristic of death from poison, they not unfrequently resemble the appearance of disease, and may have been produced by some natural cause.

In *Smethurst's* case,³ which involved much conflicting evidence as to morbid appearances supposed to have been indicative of death by slow poisoning, a pardon was granted after conviction, on the ground of the imperfection of medical science, and of the fallibility of judgment, with respect to an obscure malady, even of skilful and experienced medical practitioners.

The symptoms, for example, of cholera morbus, peritonitis, ulceration of the stomach, and hernia, resemble in a greater or less degree the symptoms of irritant poisons; while the symptoms following the administration of narcotic poisons much resemble those of such diseases as apoplexy, epilepsy, inflammation of the brain, tetanus, and heart disease. It is therefore generally regarded as unsafe to convict on symptoms alone.⁴

Nevertheless, as to some particular poisons, the symptoms may be so characteristic as to afford unmistakable evidence of poisoning, and preclude all possibility of referring the event of death to any other cause. Thus in *Palmer's* case, it was conclusively shown by numerous witnesses of the greatest professional experience, that the symptoms in the course of their progress were clearly distinguishable from those of tetanus or any other known form of disease, and were not only consistent with, but specially characteristic of, poisoning by strychnine.

And there are certain poisons which manifest themselves by their odor, which is easily detected on opening the body; such are alcohol, chloroform, nicotine, opium, and prussic acid. And external stains, such as are produced by mineral acids, are among the strongest indications furnished by a *post-mortem* examination. Where narcotic poisons have been used, the

¹ Polk v. State, 86 Ark. 117.

² Hatchett v. Com., 76 Va. 1026. See Reg. v. Lawson, *infra*.

³ Reg. v. Smethurst, C. C. C. Sess. Pap., Aug. 1859.

⁴ People v. Millard, 53 Mich. 63; Joe v. State, 6 Fla. 591; 65 Am. Dec. 579.

examination will commonly reveal an inflamed and congested state of the brain and spinal cord, for these are the parts affected by this class of poisons. From the use of irritant poisons ulceration, and even perforation of the stomach, very often results. And where none of these traces or appearances present themselves on the *post-mortem* examination it is a reasonable conclusion that death has not been caused by the administration of any of the poisons referred to.

In the famous *Harris* case, in the account of the condition of the deceased, of her various symptoms, and of the treatment and results, the testimony of the attendant physicians agreed, and they all testified in the most positive manner, that the deceased came to her death from an overdose of morphine. They based their testimony in that respect upon the appearance and existence of conditions upon and in the person which negatived the possibility of any other cause of death. One of the physicians testified that it was not an ambiguous case, and that the three stages of pleasurable excitement, of coma, and of entire nervous prostration, with an almost entire dilation of the pupils of the eyes before death, were a group of symptoms which, in connection with other observable conditions of the patient, enabled him to state as a fact that she had had an overdose of morphine. An autopsy was made some fifty-five days after death, in which the examination of the body was greatly facilitated by its good state of preservation, a circumstance due to the fact that the body having been embalmed had been interred in a brick vault kept dry by the gravelly soil surrounding it. There was the congested appearance of the brain, described as a *post-mortem* evidence of opium poisoning. An elaborate analysis resulted in the finding of morphine in the contents of the stomach, and in the membranes. It appeared that the fluid used for embalming contained no morphine. As the absorption of morphine is very quick, the finding of morphine in the analysis of the contents of the stomach, taken in connection with the fact that the deceased lived twelve hours after being taken ill, would be significant of the taking of an excessive dose of the drug. Commenting on the evidence, Mr. Justice Gray said : "The determination as to the cause of death can rest, in every judgment, safely upon a group of symptoms which invariably accompany and characterize poisoning by opium or morphine, upon the subsequent

revelations by autopsy and analysis, and upon the previous constitutional conditions of the deceased, all of which together preclude a diagnosis of any other physical disturbance differing from that made." And again: "While, undoubtedly, cases of death do occur of which an autopsy may not reveal the causes, and while the evidence of witnesses did show that there were instances of death from other causes than that of morphine poisoning, where some symptoms were exhibited similar to those observed in this instance, the group of these peculiar symptoms, which are admitted to belong to narcotic poisoning, considered with the proof of a constitutional tolerance for the drug, and with the positive testimony as to the discovery of morphine by subsequent chemical analysis, gave a basis for a judgment as to the cause of death which I see no way of doubting or of disturbing."¹

It is a very important circumstance in corroboration of the reality of alleged poisoning, if several persons are simultaneously affected with symptoms indicative of poisoning, after partaking of the same food, as when four members of a family were taken ill after having eaten of yeast dumplings made by the prisoner, who was the cook, while those members of it who had not partaken of them were not affected.²

In the famous *Graves* case the deceased, having received a bottle of a dark fluid, purporting to be whisky from an anonymous source, prepared two "toddlies," one for herself and one for the friend with whom she was living, using about the same quantity of the contents of the bottle for each. Both were taken sick soon after drinking, exhibiting symptoms of arsenical poisoning. One only recovered.³ In a recent case of attempted poisoning in Georgia, the servants and all the members of the family who had partaken of the meal were taken sick, some at an hour, and others at a longer time after

¹ *People v. Harris*, 186 N. Y. 423.

² *Rex v. Fenning*, *ut supra*. The evidence against this young girl was most unsatisfactory, and she was long thought to have been unjustly convicted (3 Mem. of Romilly, 285; *Suggestions for the Repression of Crime*, by M. D. Hill, 81), but it was subsequently stated on good authority that she made a confession to a minister of religion, who had her confidence (see the *Times* newspaper of August 5th, 1857). It is unaccountable that the statement should have been withheld, and the public suffered to remain for nearly half a century under the belief that she was wrongfully executed.

³ *Graves v. People*, 18 Col. 170.

the meal.¹ Again after the victim had experienced unpleasant effects from eating the mid-day meal, a portion of the suspected food was given to a dog, which died in about twenty minutes after eating the food, showing signs of great suffering.²

The probability in such cases is greatly strengthened if the violence of the symptoms has been in proportion to the quantities of the suspected food taken by the parties;³ and on the other hand, a favorable presumption is created, if only one member of a family is taken ill after partaking of food of which other members of it have eaten with impunity.⁴

The science of chemistry generally affords most important auxiliary evidence as to the *corpus delicti* in the investigation of cases of imputed poisoning. As with regard to scientific evidence of every other kind, the processes and results of chemical analysis in application to the discovery or reproduction of poison are subordinated to the control of those general principles of law which, in all other cases, govern the admissibility of evidence and the estimation of its weight and effect: indeed, those rules have received some of their most instructive illustrations from cases of this nature.

Evidence of chemical tests applied to the body or its contents or *excreta*, whenever it is capable of being obtained, ought to be adduced, and in such circumstances the failure to adduce such evidence, unexplained by satisfactory reasons, gives serious ground for doubt as to the reality of the alleged poisoning. The re-agents employed must be free from all impurities if any importance is to be attached to the result obtained.

A remarkable exemplification of the necessity of this caution occurred in *Smethurst's* case, in which Reinsch's test, which had previously been regarded as infallible in the separation of arsenic, turned out to be fallacious when applied to chlorate of potass; and, in fact, the arsenic which was found in the mixture had been liberated from the copper gauze employed in the experiment.⁵

¹ *Brown v. State*, 88 Ga. 257.

² *Bill v. Com.*, 88 Va. 365.

³ *Rex v. Alcorn*, 1 Syme's Just. Rep. 221.

⁴ *Rex v. Bickle*, Exeter Summ. Ass., 1884, coram Mr. Justice Patteson.

⁵ *Reg. v. Smethurst*, C. C. C. Sess. Pap., Aug. 1859, *ut supra*. But arsenic was also found in an evacuation not complicated with the same source of fallacy. See a work on *Ptomaines and Leucomaines*, by Vaughan & Novy,

But some of the vegetable poisons, in the present state of science, are beyond the reach of chemical processes. The offender himself, by his chemical knowledge and choice of means, by the administration of minimum doses, or by the destruction of the portions of the body containing the suspected matter, or by the destruction, dilution, or other tampering with its *excreta* or contents, may have rendered detection by the reproduction of the deadly agent impracticable; or the absorption of the poison, or a want of skill in the experimenter, or failure to employ the proper means, or other cause, may have rendered the necessary chemical researches impracticable, unsatisfactory, or inconclusive.¹

The concurrence, moreover, of a plurality of characteristic tests, separately fallacious, but fallacious from different causes, may, in connection with strong moral facts, yield a result of so high a degree of probability as to be perfectly convincing, though the poison has not been reproduced.²

The subject of what has been called the *post-mortem imbibition of poisons* has of late years received a great deal of attention. It is manifest that if a poison injected into the body after death will diffuse itself through the body, and into the various organs into which it finds its way, when administered during life, the presumption that would arise from the detection of the poison in the organs if the poison could be diffused only by circulation, that death was the result of the administration of poison, would never exist. The question most frequently arises in cases of supposed arsenical poisoning, for arsenic, as is well known, is a constituent of the embalming fluids in most common use. As far back as 1847 Orfila admitted the possibility of imbibition being practised on the human body with criminal intent. But until very recently toxicological writers have supposed the diffusion of poison injected after death to be of very rare occurrence. This was the most important question which arose in the *Millard* trial. In that case the experts were asked in effect: "Granting that white arsenic suspended in water was injected into the mouth and rectum a few hours after death, would it diffuse through

p. 156, where instances are mentioned of the common impunity of several re-agents.

¹ *Rex v. Donellan, Reg. v. Smethurst, ut supra; Reg. v. Palmer, post.*

² *Rex v. Elder, 1 Syme's Jud. Rep. 71. And see Rex v. Donnall, post.*

the body to such an extent that it would be found in the liver and kidneys?"¹ Dr. Vaughan, an expert witness for the defence, testified that "if within twenty-four hours after the death of Mrs. Millard, arsenic to the amount of one half a teaspoonful had been injected into the stomach and rectum, and the body buried, and examined 105 days afterwards, he would expect, from reading and experiments, to find arsenic in the liver from that injected." Subsequent experiments have proved "beyond a doubt, that arsenic may diffuse through a dead body,"² and even that the finding of arsenic in the brain is no proof that it was administered during life.³

"It must be admitted," says Dr. Miller, in the article to which reference has just been made, that "there are only very rare opportunities for the toxicologist to detect a discriminative method between *ante* and *post-mortem* poisoning. But the microscopist, with his knowledge of the histological and pathological appearance of organs, may perhaps be able to discover, by rigid searching with his microscope, some permanent appreciable difference; for it is not improbable that there may take place certain *specific* changes in the histological constituents of an organ, due to the deposition of a substance like arsenic, through the medium of the blood circulation during life, which changes would not manifest themselves as the result of an after-death deposition."⁴ Dr. Reese, dealing with

¹ People v. Millard, 53 Mich. 63. See also People v. Hall, 48 Mich. For a valuable statement of the medico-legal points in the Millard case, see a paper read before the First American International Medico-Legal Congress, June, 1889, by Dr. Victor C. Vaughan.

² See the paper above referred to, and see a record of experiments in vol. 1 of the Journal of the American Medical Asso., p. 115.

³ See an article by Dr. Geo. B. Miller in the Medico-Legal Journal for March, 1888. A recent case is reported in vol 13 of the Journal of the American Chemical Soc., p. 283. A man had died from a disease diagnosed as remittent fever. Two hours after death the body was embalmed by thrusting an embalming needle into the abdomen and injecting an embalming fluid which contained 100 grains of arsenic tri-oxide and 10 grains or zinc sulphate in each fluid ounce. Suspicion of poisoning having arisen, the coroner took charge of the case and held an autopsy twenty-four hours after death. The diagnosis was confirmed; but the brain was removed and analyzed. A portion of it weighing 110 grammes contained one and six-tenths milligrams of arsenic tri-oxide, and a small quantity of zinc. It was thus clear that the arsenic found in the brain had been deposited there by the diffusion of the embalming fluid.

⁴ See Medico-Legal Journal, March, 1888, p. 506.

the same question,¹ declared that "there was no known method by which such discrimination could be made, if reliance was to be had exclusively on the chemical analysis of the body, since this simply established the *fact* of the presence or absence of the poison, but did not necessarily disclose its *mode of introduction*." At any rate, any evidence on this point must be, in almost every case, largely speculative, and ought not to receive, and in most cases would not receive, much consideration at the hands of a jury debating the existence or non-existence of a heinous crime. The result of the whole matter is, as has been wisely pointed out,² "that the chemical evidence should not be held in the highest esteem, and be given the place of first importance in all cases."

By no case is the unreliability of chemical evidence better illustrated than by the *Buchanan* case.³ Dr. Buchanan was charged with the murder of his wife by the administration of morphine. Prof. Withaus claimed to have discovered morphine in the body of the dead woman, which had been buried forty-four days. He testified that by the use of certain chemical re-agents he obtained results indicating the presence of morphine. Dr. Vaughan, a witness for the defence, testified that he had obtained similar results with an extract of pancreas.

And here may be mentioned another discovery of modern science which is of the greatest importance in this connection. During a trial for criminal poisoning in Prussia, in 1874, the analyst discovered a substance which he claimed to be conine. This was submitted to a distinguished toxicologist, Otto, who pronounced it to be neither conine, nicotine, nor any vegetable alkaloid with which he was acquainted. In another case, from a body slightly decomposed, an alkaloid was obtained which in some respects resembled strychnine. And in the Longogua trial at Cremona, Italy, a substance resembling morphine was found. It is an important fact, which the activity of modern scientific research has revealed, that animal bodies during putrefaction produce alkaloidal substances, some of which resemble, some by their chemical reaction, and others by the symptoms they produce, vegetable alkaloids; while

¹ Medico-Legal Journal, Sept. 1887, p. 184.

² Medico-Legal Journal, March, 1888, 506.

³ Tried in New York City, April, 1893.

others again when present in the same solution mark the characteristic reactions of vegetable alkaloids.¹

In the case of *People v. Stephens*,² no attempt had been made to embalm the body, and an attempt was made to account for the arsenic found in the body of the deceased, which had been buried for a considerable length of time, by the theory that arsenic in the soil had reached the body by the action of rain water percolating through the soil. But on examination of the coffin, and the nails therein, and of the soil surrounding the grave, no trace of arsenic was found. It has been since demonstrated that, even when arsenic is present in the soil, a body cannot absorb the poisonous substance, for the arsenic becomes fixed in the soil and is insoluble.³ In the *Millard* case an attempt was made by the prosecution to detect arsenic in the soil on to which the matter vomited by the deceased had been thrown. Finding no arsenic, the prosecution claimed that it had been washed deeper into the earth, and distributed in every direction. The defence contended for the fixation of arsenic in the soil, which has since been experimentally demonstrated.⁴

It would be most unreasonable, therefore, and lead to the grossest injustice, and in some circumstances to immunity of the worst of crimes, to require, as an imperative rule of law, that the fact of poisoning shall be proved by any special and exclusive medium of proof, when that kind of proof is unattainable, and especially if it has been rendered so by the act of the offender himself. No universal and invariable rule, therefore, can be laid down; and every case must depend upon its own particular circumstances; and, as in all other cases, the *corpus delicti* must be proved by the best evidence which is capable of being adduced, and such an amount and combination of relevant facts, whether direct or circumstantial, as establish the imputed guilt to a moral certainty, and to the exclusion of every other reasonable hypothesis. It was held in a recent case that neither chemical analysis nor an autopsy was absolutely necessary.⁵ And where the accused was charged

¹ See on this subject, Vaughan & Novy on *Ptomaines and Leucomaines*, especially at p. 174 *et seq.*, a work which I have freely consulted.

² 4 Park. C. C. 396. And see 1 Crim. L. Mag. 295.

³ Comptes Rendus, 100, 1889.

⁴ See Paper read before First Am. International Medico-Legal Congress, by Dr. Vaughan.

⁵ Polk v. State, 36 Ark. 117.

with having caused the death of the deceased by inducing him to drink from a bottle represented as containing whisky, but which was supposed to contain a poisonous mixture, a conviction was had though there was no *post-mortem* examination of the body of the deceased, nor any analysis of the contents of the bottle.¹

In *Tawell's* case it was strenuously urged by the counsel for the prisoner that it was a rule of law that there ought to be positive proof of the *mode* of death, and that such a quantity of poison was found in the body of the deceased as would necessarily occasion death. But this doctrine was peremptorily repudiated by Mr. Baron Parke, who told the jury, that "if the evidence satisfied them that the death was occasioned by poison, and that that poison was administered by the prisoner, if that," said his lordship, "is proved by circumstantial evidence, it is not necessary to give direct and positive proof what is the quantity which would destroy life, nor is it necessary to prove that such a quantity was found in the body of the deceased, if the other facts lead you to the conclusion that the death was occasioned by poison, and that it was knowingly administered by the prisoner. You must take this fact, just the same as all the other parts of the case, and see if you are satisfied, as reasonable men, whether the prisoner is guilty or not. The only fact which the law requires to be proved by direct and positive evidence is the death of the party, by finding the body; or when such proof is absolutely impossible, by circumstantial evidence leading closely to that result, as where a body was thrown overboard far from land, when it is quite enough to prove that fact without producing the body." His lordship, in a subsequent part of his charge, said, "There is very reasonable evidence, supposing that to be required which I tell you is not, that the quantity of prussic acid in the stomach amounted to one grain; and although that is not necessary to be proved, the scientific evidence shows that one grain may be enough to destroy life." In reference to the argument urged by the prisoner's counsel, that the deceased might have died from some sudden emotion, the learned judge said that it was within the range of possibility that a person might so die without leaving any trace on the brain; *they*

¹ Hatchett v. Com., 76 Va. 1026.

were to judge whether they could attribute death to that cause, if they found strong evidence of the presence of poison; because they were not to have recourse to mere conjecture; that, where the result of the evidence gave them the existence of a cause to which it might be rationally attributed, they were not to suppose it was to be attributed to any other cause.

In a recent case, where the defendant was convicted of the murder of his wife by placing an arsenical poison—"Rough on Rats"—in the flour which was used by her in the preparation of a meal for herself and family, there was evidence of an analysis of bread and flour found by a witness in the house of the deceased the day after her death, and of the finding of arsenic in such bread, and also in the stomach of the deceased. But the jury were instructed that, before they could consider the testimony of the experts as to the analysis of the bread and flour, they must be satisfied beyond a reasonable doubt that the bread and flour analyzed were parts of the same of which the deceased ate.¹

Lord Campbell, in *Palmer's* case, said that it was not to be expected that witnesses should be called to state that they saw the deadly poison administered by the prisoner, or mixed up by the prisoner openly before them. Circumstantial evidence as to that, continued the learned judge, is all that can be reasonably expected; and if there were a series of circumstances leading to the conclusion of guilt, a verdict of guilty might satisfactorily be pronounced. With respect to the consideration that no strychnia was found in the body, it was for them to consider, but there was no rule of law according to which the poison must be found in the body of the deceased, and all that they knew respecting the poison not being in the body was, that in that part of the body that was analyzed by the witnesses no strychnia had been found. And in a late case in Virginia it was held not to be absolutely necessary that poison be found in the body of the deceased, for the reason that some poisons may be given in a quantity sufficient to produce death without leaving a trace to be discovered in the body.²

¹ *State v. Best* (N. C.), 15 S. E. 930.

² *Hatchett v. Com.*, 76 Va. 1026.

CHAPTER II.

THE ADMINISTRATION OF THE POISON.

SECTION I.

Possession of Poison by the Accused.

It is in the next place necessary to establish that the poison was administered by the prisoner.¹ The probability of any other means must be excluded.

It is common for the defence, in cases of this kind, to set up the theory of suicide. An illustration of this course is to be found in the case of *Madeleine Smith*.² And wherever the facts give a color of probability to the claim, it may be said on behalf of the defence that the deceased, having been in the habit of taking the particular poison specified as the cause of death, had perished as a result of inadvertence in taking a larger dose than usual. In a late case the defence having offered to prove that at a former time, ten years before her death, the deceased was accustomed to take arsenic, and that she had told a witness that she was obliged to take it for her health, the court would not admit this, unless it were to be followed by other evidence bringing the habit down to a reasonable time before death.³

The possession of poisonous matter by the party charged with the administration of it, is always an important fact. When death has been caused by poison of the same kind, and no satisfactory explanation of that fact is given by the accused or suggested by the surrounding circumstances, a strong infer-

¹ *Hatchett v. Com.*, 76 Va. 1026.

² See *infra*, 401 *et seq.*

³ *Goersen v. Com.*, 106 Pa. St. 477.

ence of guilt may be created against the accused ; especially if he has attempted to account for such possession by false statements. On the trial of *Mary Hartung* for the murder of her husband, it appeared that about two days before the death of the deceased, the accused had bought arsenic on the pretence of wanting it for one who wished to stuff birds. This excuse was shown to be false.¹ In *Palmer's* case, Lord Chief Justice Campbell said that if the jury should come to the conclusion that the symptoms which the deceased had exhibited were consistent with strychnia, a fearful case was made out against the prisoner. "I have listened," said the learned judge, "with the most anxious attention, to know what explanation would be given respecting the strychnia that has been purchased by the prisoner. There is no evidence of the intention with which it was purchased, there is no evidence how it was applied, what became of it, or what was done with it."² In *Stephen's* case³ the prisoner had purchased half an ounce of arsenic—the poisonous agent—about six weeks before the wife's death ; and a like quantity a short time later, and before death. Some relatives testified that the accused had purchased the poison for them, to be used in killing vermin ; but very little weight was attached to this explanation, the judge in his charge calling attention to the fact that it was testified to by relatives of the prisoner, who might be supposed to strain every point to save the life of the prisoner and to ward off ignominy from the family, at the same time telling the jury that the importance of the explanation was for them to determine. Other circumstances were conclusive. It was shown in another case that a few days before the commission of the alleged crime, the prisoner had moved from a house, and that the new occupant had found on a ledge over the door a white substance which he had handed to the prisoner, who said that it was "rat poison," and took it away with her.⁴ In the case of *Com. v. Robinson*,⁵ the prosecution was unable to prove clearly actual possession of the poison by the prisoner. The defence were not slow to see the advantage thus given them, and the prisoner was put on the stand and swore that she had never seen

¹ *People v. Hartung*, 4 Park. Cr. R. 256.

² See Report of this case at p. 313.

³ *People v. Stephens*, *infra*.

⁴ *Brown v. State*, 88 Ga. 257.

⁵ Tried in Boston, Dec. 1887 and Feb. 1888.

arsenic—the drug which produced death—in her life, and that she was, indeed, unable to say whether it was a powder or a liquid.¹

SECTION II.

Opportunity Must be Shown.

Not only must it appear that the accused possessed the deadly agent, but it is indispensable to show that he had the *opportunity* of administering it.² *Stephens* was on nearly all occasions in the room with his wife alone, during the latter's last illness, and administered to her food and drinks.³ Where several members of a family were taken sick after eating of food supposed to have been tampered with by the prisoner, a discharged servant, it was shown that the flour for the morning meal had been got out, as was the custom, the night before and placed on a table in the kitchen. The prisoner was known to have passed through the kitchen after this had been done, and when no one else was there, carrying a cup and towel, which she said she was returning to one of the members of the family to whom the articles belonged.⁴

No difficulty will be experienced in proving the opportunity where the accused was the medical adviser or attendant physician of the deceased. This was *Dr. Lamson's* case. In this case the prisoner had, on various occasions, sent medicine to the deceased, and, on the night of the deceased's death, had visited him and given him some powders which the deceased actually took.⁵

James Hall was convicted of an attempt to murder his wife

¹ It is interesting to note here that, a short time after this trial, it was published as a fact that on cleaning out and remodelling the house formerly occupied by Mrs. Robinson, a package of "Rough on Rats"—an arsenical poison—was found behind the bricks of the furnace. This, if true, would supply the missing evidence, and clear away all doubt as to the propriety of the verdict. See *Medico-Legal Journal*, Dec. 1888, p. 303.

See further, in illustration of this point, *Com. v. Hobbs*, 140 Mass. 443.

² An interesting case is that of *Madame Joniaux* commented on, with a summary of the facts, in 51 Alb. L. J. 114.

³ *People v. Stephens*, *infra*.

⁴ *Brown v. State*, 88 Ga. 257.

⁵ See *The Lancet*, London, Eng., March 18, 1882, p. 455.

by poison. The evidence showed that the prisoner and his wife had been married nineteen years and had four children. For several years all marital relations had ceased between them. They had been at enmity for a considerable time, and the prisoner had once abandoned his family and remained away from them for about a year. At the end of that time the family came to him, and thereafter they lived under one roof. But during this time the wife occasionally spoke of leaving her husband altogether, and he, on his part, charged her with unchastity. At this time, too, the prisoner had conceived a violent passion for a young woman in the neighborhood, and had openly declared his attachment for her. On the day when the attempt on the life of his wife was alleged to have been made the following event occurred. The wife, being absent from home, dinner was prepared by one of the daughters, who, at the usual hour, called in the prisoner and the other three children. While dinner was in progress the wife, who had gone to the house of a neighbor to borrow a pattern to make some garment, returned, and went into an adjoining room to iron out the pattern. The children having finished their dinner, all came into the room where the mother was, leaving the prisoner sitting at the table. The wife coming presently into the room to eat her dinner, the prisoner arose from the table and went to the stove, and brought some bread therefrom and handed it to his wife, and then seated himself beside the stove, and put his feet into the oven. The wife, having taken gravy from a bowl on the table and mixed it with bread, began to eat, but at the first mouthful cried out, "This is awful bitter," and ran to the door and spat out what she had in her mouth. The children having come out into the room, the son took some white particles on the surface of the gravy and tasted them and said they were bitter. The gravy was then given to a dog, who ate it and presently manifested symptoms of great suffering. A doctor was sent for, and when he arrived, finding the wife showing symptoms of strychnine poisoning, gave her sweet milk as an antidote. The prisoner had up to this taken no part in what was going on, but now said: "If sweet milk is good for her, give me some for the dog." In about twenty minutes the dog died. The prisoner on being questioned about the poison said that he could not have gotten it from a store without giving his name, and having that and

the quantity and the date recorded, and gave no other explanation.¹

It will be seen that while the accused was sitting alone in the eating-room he had abundant opportunity to place the poison in the food of which his wife was to partake. It was a circumstance much commented on at the trial that, on his wife's entering the room to eat her meal, the accused, who had been living on terms of enmity with her, arose and gave her bread. The accused was a laborer, and it was also a fact worth noticing that he knew of the conditions with which he would have to comply before the poisonous drug would be sold to him. It was well asked, "How did he acquire this information?"

Upon the effect of these heads of evidence, and upon the caution with which they ought to be received, some valuable observations were made by Mr. Baron Rolfe in a case before him. The prisoner was indicted for the murder of his wife, who was taken ill on the morning of the 25th of November, and died two days afterwards with symptoms resembling those of an irritant poison. Poisoning not having been suspected, the body was interred without examination: but suspicions having afterwards arisen, it was exhumed in the month of June following, and a large quantity of arsenic was discovered in the stomach. Several weeks after the apprehension of the prisoner, the police took possession of some of his garments, which were found hanging up in his lodgings, in the pockets of which arsenic was found. In his address to the jury, Mr. Baron Rolfe said, "Had the prisoner the opportunity of administering poison? that was one thing. Had he any motive to do so? that was another. There was also another question, which was most important; it was whether the party who had the opportunity of administering poison had poison to administer? If he had not the poison, the having the opportunity became unimportant. If he had the poison, then another question arose, did he get it under circumstances to show that it was for a guilty or improper object? The evidence by which it was attempted to trace poison to the possession of the prisoner was, that on a certain occasion, after the death of the wife, and after he himself was apprehended, the contents of the pockets of a coat, waistcoat, and trousers, on being tested

¹ Bell v. Com., 88 Va. 365. This statement of facts is condensed from the official report.

by the medical witnesses, were found to contain arsenic ; and that, a week afterwards, another waistcoat which came into the possession of the policeman, on being examined, was also found to contain arsenic. Did that bring home to the prisoner the fact that he had arsenic in his possession in November ? It was not conclusive that, because he had it in June, he had it in November. He (the learned judge) inferred from what had been stated by the medical men, that the quantity of arsenic found in the pockets of the clothes was very small. Now, if he had it in a larger quantity in November, and it had been used for some purpose, being a mineral substance, such particles were likely to remain in the pockets, and finding it there in June was certainly evidence that it might have been there in larger quantity in November ; but obviously, by no means conclusive, as it might have been put in afterwards. But connected with the arsenic being found in the clothes, there were other considerations which he thought were worthy to be attended to. The prisoner was apprehended on the 9th of June, and he knew long before that time that an inquiry was going on. He was taken up, not in the clothes in which the arsenic was found ; and a fortnight afterwards a batch of clothes was given up in which arsenic was detected. Now, if arsenic had been found in the clothes he was wearing, it would be perfectly certain, in the ordinary sense, that he had arsenic in his possession. But it was going a step further to say that because arsenic was discovered in clothes of his, accessible to so many people between the time of his apprehension and their being given up, it was there when he was apprehended ; in all probability, he thought, it was, but that was by no means the necessary consequence. That observation was entitled to still more weight, with regard to the waistcoat last given up to the police, because it was not given up till three weeks after the prisoner was apprehended, and had been hanging in the kitchen, accessible to a variety of persons. . . . It was urged also that arsenic was used for cattle. It might be so, and it might be that the prisoner might innocently have had arsenic. The circumstance of there being arsenic in so many pockets ought not to be lost sight of, for it could scarcely be conceived that a guilty person should be so utterly reckless as to put the poison he used into every pocket he had. One would have thought that he would have kept it concealed, or put it only

in some safe place for the immediate purpose of being used ; and it was worthy of observation that it did not appear to have been put into the clothes in such a way as it would have been put had the prisoner been desirous to conceal it. The prisoner was acquitted.¹

In a case of the deepest interest, before the High Court of Justiciary at Edinburgh, a question whether or not the prisoner had the opportunity of administering arsenic to the deceased was the turning-point of the case. The prisoner, a young girl of nineteen, was tried upon an indictment charging her, in accordance with the law of Scotland, with the administration to the same person of arsenic, with intent to murder, on two several occasions in the month of February, and with his murder by the same means on the 22d of March following. She had returned home from a boarding-school in 1853, and in the following year formed a clandestine connection with a foreigner of inferior position, named L'Angelier, whose addresses had been forbidden by her parents, which early in 1856 became of a criminal character, as was shown by her letters. In the month of December following, another suitor appeared, whose addresses were accepted by her with the consent of her parents, and arrangements were made for their marriage in June. During the earlier part of this engagement, the prisoner kept up her interviews and correspondence with L'Angelier ; but the correspondence gradually became cooler, and she expressed to him her determination to break off the connection, and implored him to return her letters ; but this he refused to do, and declared that she should marry no other person while he lived. After the failure of her efforts to obtain the return of her letters, she resumed in her correspondence her former tone of passionate affection, assuring him that she would marry him and no one else, and denying that there was any truth in the rumors of her connection with another. She appointed a meeting on the night of the 19th February, at her father's house, where she was in the habit of receiving his visits, after the family had retired to rest, telling him that she wished to have back her "cool letters," apparently with the intention of inducing him to believe that she remained constant in her attachment to him. In the middle of the night after that interview, at which he had taken coffee prepared by the prisoner, L'Angelier was seized

¹ Reg. v. Graham, Carlisle Sum. Ass., 1845.

with alarming illness, the symptoms of which were similar to those of poisoning by arsenic. There was no evidence that the prisoner possessed arsenic at that time, but on the 21st she purchased a large quantity, professedly for the purpose of poisoning rats, an excuse for which there was no pretence. On the night of the 22d, L'Angelier again visited the prisoner, and about eleven o'clock on the following day was seized with the same alarming symptoms as before; and on this occasion also he had taken cocoa from the hands of the prisoner. After this attack L'Angelier continued extremely ill, and was advised to go from home for the recovery of his health.

On the 6th of March the prisoner a second time bought arsenic; and on the same day she went with her family to the Bridge of Allan (where she was visited by her accepted lover), and remained till the 17th, when they returned to Glasgow. On the day before her departure for the Bridge of Allan, L'Angelier wrote a letter to her, in which he reproached her for the manner in which she had evaded answering the questions which he had put to her in a former letter respecting her rumored engagement with another person, expressed his conviction that there was foundation for the report, and after repeating his inquiries threatened, if she again evaded them, to try some other means of coming at the truth. To this letter the prisoner, although she had been engaged nearly two months, and was receiving the visits of her affianced at the Bridge of Allan, from which place she wrote, replied that there was no foundation for the report, and that she would answer all his questions when they met, and informed him of her expected return to Glasgow on the 17th of March. L'Angelier, pursuant to medical advice, on the 10th of March went to Edinburgh, leaving directions for the transmission of his letters, and having become much better, left that place on the 19th for the Bridge of Allan. During this interval, namely, on the 17th, he returned to his lodgings at Glasgow, and inquired anxiously of his landlady if there was no letter waiting for him, as the prisoner's family were to be at home on that day, and she was to write to fix another interview. He left Glasgow again on Thursday, the 19th, for the Bridge of Allan, leaving directions as before for the transmission to him of any letter which might come for him during his absence. On the 18th of March the prisoner a third time purchased a large quantity of arsenic, alleging, as before, that

it was for the purpose of killing rats. A letter from the prisoner to L'Angelier came to his lodgings on Saturday, the 21st, from the date and contents of which it appeared that she had written a letter appointing to see him on the 19th; he had not, however, received it in time to enable him to keep her appointment. In that letter she urged him to come to see her, and added: "I waited and waited for you, but you came not. I shall wait again to-morrow night, same time and arrangement." This letter was immediately transmitted to L'Angelier, and in consequence he returned to his lodgings at Glasgow about eight o'clock on the evening of Sunday, the 22d, in high spirits and improved health, having travelled a considerable distance by railway, and walked fifteen miles. He left his lodgings about nine o'clock, and was seen going leisurely in the direction of the prisoner's house, and about twenty minutes past nine he called at the house of an acquaintance who lived about four or five minutes' walk from the prisoner's residence. After leaving his friend's house, all trace of him was lost, until two o'clock in the morning, when he was found at the door of his lodgings, unable to open the latch, doubled up and speechless from pain and exhaustion, and about eleven o'clock the same morning he died, from the effects of arsenic, of which an enormous quantity was found in his body. The prisoner stated in her declaration that she had been in the habit of using arsenic as a cosmetic, and denied that she had seen the deceased on that eventful night; whether she had done so or not was the all-momentous question. As there was no evidence that the prisoner possessed poison at the time of the first illness, nor any analysis made of the matter ejected on either the first or second illness, the learned Lord Justice Clerk Cockburn said that there was no proof of the administration of poison on either of those occasions; that the first charge, therefore, had entirely failed, and that it was safer not to hold that the second illness was caused by poison. As to the principal charge of murder, his lordship said, "Supposing the jury were quite satisfied that the prisoner's letter brought L'Angelier again into Glasgow, were they in a situation to say, with satisfaction to their consciences, that as an inevitable and just result from this, they could find it proved that the prisoner and deceased had met that night? that was the point in the case. But it is for you to say here, whether it has been proved that L'Angelier was in the house that night."

If you can hold that that link in the chain is supplied by just and satisfactory inference—remember that I say, just and satisfactory—and it is for you to say whether the inference is satisfactory and just, in order to complete the proof, if you really feel that you may have the strongest suspicion that he saw her, for really no one need hesitate to say that, as a matter of moral opinion, the whole probabilities of the case are in favor of it, but if that is all the amount that you can derive from the evidence, the link still remains wanting in the chain, the catastrophe and the alleged cause of it are not found linked together. And therefore you must be satisfied that you can here stand and rely upon the firm foundation, I say, of a just and sound, and perhaps I may add, inevitable inference. That a jury is entitled often to draw such an inference there is no doubt. . . . If you find this to be a satisfactory and just inference, I cannot tell you that you are not at liberty to act upon it, because most of the matters occurring in life must depend upon circumstantial evidence, and upon the inferences which a jury may feel bound to draw. But it is an inference of a very serious character; it is an inference upon which the death of this party by the hand of the prisoner really must depend. And then, you will take all the other circumstances of the case into your consideration, and see whether you can infer from them that they met. If you think they met together that night, and he was seized and taken ill, and died of arsenic, the symptoms beginning shortly after the time he left her, it will be for you to say, whether in that case there is any doubt as to whose hand administered the poison.” In another part of his charge the learned judge said: “In the ordinary matters of life, when you find the man came to town for the purpose of getting a meeting, you may come to the conclusion that they did meet; but, observe that becomes a very serious inference indeed to draw in a case where you are led to suppose that there was an administration of poison and death resulting therefrom. It may be a very natural inference, looking at the thing morally. None of you can doubt that she waited for him again; and if she waited the second night, after her first letter, it was not surprising that she should look out for an interview on the second night, after the second letter. . . . She says, ‘I shall wait again to-morrow night, same hour and arrangement.’ And I say there is no doubt, but it is a matter for the jury to consider, that after writing this letter

he might expect she would wait another night—that is the observation I made—and therefore it was very natural that he should go to see her that Sunday night.

“ But, as I said to you, this is an inference only. If you think it such a just and satisfactory inference that you can rest your verdict upon it, it is quite competent for you to draw such an inference from such letters as these, and from the conduct of the man coming to Glasgow for the purpose of seeing her, for it is plain that that was his object in coming to Glasgow. It is sufficiently proved that he went out immediately after he got some tea and toast, and had changed his coat. But then, gentlemen, in drawing an inference, you must always look to the important character of the inference which you are asked to draw. If this had been an appointment about business, and you found that a man came to Glasgow for the purpose of seeing another upon business, and that he went out for that purpose, having no other object in coming to Glasgow, you would probably scout the notion of the person whom he had gone to meet saying I never saw or heard of him that day; but the inference which you are asked to draw is this, namely, that they met upon that night, where the fact of their meeting is the foundation of a charge of murder. You must feel, therefore, that the drawing of an inference in the ordinary matters of civil business, or in the actual intercourse of mutual friends, is one thing, and the inference from the fact that he came to Glasgow, that they did meet, and that, therefore, the poison was administered to him by her at that time, is another, and a most enormous jump in the category of inferences. Now, the question for you to put to yourselves is this: Can you now, with satisfaction to your own minds, come to the conclusion that they did meet on that occasion, the result being, and the object of coming to that conclusion being, to fix down upon her the administration of the arsenic by which he died?

“ She has arsenic before the 22d; and that is a dreadful fact, if you are quite satisfied that she did not get it and use it for the purpose of washing her hands and face. It may create the greatest reluctance in your mind, to take any other view of the matter than that she was guilty of administering it somehow, though the place where may not be made out, or the precise time of the interview. But, on the other hand, you must keep in view that arsenic could only be administered by

her if an interview took place with L'Angelier ; and that interview though it may be the result of an inference that may satisfy you *morally* that it did take place, still rests upon an inference alone ; and that inference is to be the ground, and must be the ground, on which a verdict of guilty is to rest. Gentlemen, you will see, therefore, the necessity of great caution and jealousy in dealing with any inference which you may draw from this. You may be perfectly satisfied that L'Angelier did not commit suicide ; and of course it is necessary for you to be satisfied of that, before you could find that anybody administered arsenic to him. Probably none of you will think for a moment that he went out that night, and that, without seeing her, and without knowing what she wanted to see him about, if they had met, he swallowed about 200 grains of arsenic in the street, and that he was carrying it about with him. Probably you will discard that altogether, . . . yet, on the other hand, gentlemen, keep in view that that will not of itself establish that the prisoner administered it. The matter may remain most mysterious, wholly unexplained ; you may not be able to account for it on any other supposition ; but still that supposition or inference may not be a ground on which you can safely and satisfactorily rest your verdict against the panel. Now, then, gentlemen, I leave you to consider the case with reference to the views that are raised upon this correspondence. I don't think you will consider it so unlikely as was supposed, that this girl, after writing such letters, may have been capable of cherishing such a purpose. But still, although you may take such a view of her character, it is but a supposition that she cherished this murderous purpose ; the last conclusion, of course, that you ought to come to merely on supposition, and inference, and observation, upon this varying and wavering correspondence of a girl in the circumstances in which she was placed. It receives more importance, no doubt, when you find the purchase of arsenic just before she expected, or just at the time she expected, L'Angelier. But still these are but suppositions ; they are but suspicions.

“ I don't say that inferences may not competently be drawn ; but I have already warned you as to inferences which may be drawn in the ordinary matters of civil life, and those which may be drawn in such a case as this ; and therefore, if you cannot say, We find here satisfactory evidence of this meeting, and

that the poison must have been administered by her at a meeting, whatever may be your suspicion, however heavy the weight and load of suspicion is against her, and however you may have to struggle to get rid of it, you perform the best and bounden duty as a jury, to separate suspicion from truth, and to proceed upon nothing that you do not find established in evidence against her." The jury returned, in conformity with the law of Scotland, a verdict of not guilty on the first, and of not proven on the second and third charges.¹ On the supposition that the parties met on the fatal evening in question, there could be but one conclusion as to the guilt of the prisoner, the hypothesis of suicide being considered by the learned judge as out of the question, as it obviously was; and in the language of the learned judge, "that this man, ardent to see this girl again, hoping to get the satisfactory answer which she had promised to give him respecting her rumored engagement with another, should hurry home on the Sunday night, and go out from his lodgings in the hope that he could find her waiting, and that there was the greatest probability of his seeing her, was, he thought, the only conclusion the jury could come to in the matter." Without presumption, it may be observed that the distinction thus drawn between "a very natural inference, looking at the thing morally," "an inference that may satisfy a jury morally," so that "no one need hesitate to say as a matter of moral opinion, the whole probabilities of the case are in favor of it," and "as the only conclusion the jury could come to," and that moral certainty which is the only foundation of our confidence in the sufficiency and safety of conclusions based upon circumstantial evidence, and which in every case can be but inferential, is fine and shadowy in the extreme. Nor is it easy to reconcile with sound principle, as recognized in other cases, English and Scotch, any distinction in the application of the rules of evidence and inference according as the subject-matter relates to the ordinary or the uncommon events of life.² And even upon that supposition, surely no matter or occasion of ordinary business could have been more important to her, or have more deeply interested the parties, or be more likely to bring two young persons so mutually implicated together,

¹ *Reg. v. Madeleine Smith*, June, 1857; Reports of A. F. Irvine, Advocate, and John Morrison, Advocate.

² *Rex v. Ings*, and *Reg. v. Hanson and others*, *ante*.

than the object of the anxiously looked-for meeting appointed for the night in question.

Of the various heads of evidence in charges of poisoning, that of moral conduct is of most general interest. The *data* of physiological and pathological and chemical science must always be matter of opinion testified to by skilled witnesses ; whereas in the forensic discussion of moral facts, appeal is necessarily made to those psychological principles of our nature which give them pertinence and significance, and upon which every intelligent person is capable of forming a trustworthy judgment. It would be absurd to suppose that such facts, when clearly connected by adequate independent evidence with a *corpus delicti*, are simply fortuitous and phenomenal ; on the contrary, they are the natural and unmistakable manifestations of the secret workings of the mind, not only throwing light upon, and bringing into relief, the character of the act itself, but tending also to discriminate the individual guilty actor. His necessities, his antipathies, or other motives, his reluctance to permit examination of the body, or its contents, or *excreta*, or of other suspected matter, his contrivances to prevent it, his attempts to tamper with the witnesses or the officers of justice, or with such suspected matter, or with any other article of real evidence, his falsehoods, subterfuges, and evasions, these and many other circumstances constitute most material explanatory parts of the *res gestæ*, and afford relevant and frequently conclusive evidence, from which his guilt may be reasonably inferred.

In the *Harris* case ¹ a witness was permitted to testify to a conversation with the defendant in which, after boasting of his previous extensive intercourse with women, and of his successful methods for violating their persons, he admitted having previously contracted two secret marriages, made necessary to overcome the scruples of the women. This was clearly admissible on the question of motive, for with his previous secret marriage, the publicity of his later marriage with the deceased would have ruined his reputation, and probably submitted him to a criminal prosecution as a bigamist. Another witness was allowed to testify that a short time before the fatal illness of the deceased, the defendant had illicit re-

¹ *People v. Harris, infra.*

lations with a young woman in another part of the State, and that the witness had overheard a conversation between them in which the defendant suggested that the woman marry some old man with plenty of money, and that they could then "give him a pill," and get him out of the way. This bore upon the question of motive, and tended to rebut the strong presumption in favor of a husband on trial for the murder of his wife. "The evidence of an illicit intercourse went to exhibit what were the defendant's feelings towards his wife, and bore upon his desire to get rid of the marriage relation. The further evidence in what he proposed to his mistress, that she could or should do, went to exhibit how strongly he desired the permanence of their relations, and to point out a way by which, in the future, they could secure that permanence with such advantages in their surroundings as the possession of wealth would procure."¹

In another case the wife of the prisoner whom he was charged with poisoning was much older than he, and had lost some of her personal attractions. And she had living with her a niece who was young and attractive, and for whom the accused had conceived a strong passion. It appeared that he had, on at least one occasion, made an attempt to have criminal intercourse with the niece. And it was supposed that an anonymous letter written to one of the niece's suitors, making an attack on the girl's character and attempting to dissuade the suitor from paying further attention to her, had been written by the accused.² In a case of attempted poisoning of a woman by her husband, it was shown that the two had lived at enmity for a considerable time before the attempt, and that the accused had openly declared an all-devouring passion for a young woman of the neighborhood.³

In the *Graves* case the motive suggested was that the defendant might get possession of a large sum of money which the defendant supposed that the deceased would bequeath to him at her death.⁴

On the trial of a negress for attempted poisoning, it appeared that the accused had been discharged from the service of the

¹ See opinion of GRAY, J.

² *People v. Stephens, infra.*

³ *Bell v. Com.*, 88 Va. 365.

⁴ *Graves v. People*, 18 Col. 170. See also *State v. Baldwin*, 36 Kan. 1.

family on the day before the attempt was made, and had been threatened with a beating.¹

In most criminal charges, the evidence of the *corpus delicti* is separable from that which applies to the indication of the offender; but in cases of poisoning, it is scarcely ever possible to obtain conclusive evidence of the *corpus delicti*, irrespectively of the explanatory evidence of moral conduct; and Mr. Justice Buller, in *Donellan's* case, told the jury that "if there was a doubt upon the evidence of the physical witnesses, they must take into their consideration all the other circumstances, either to show that there was poison administered, or that there was not, and that every part of the prisoner's conduct was material to be considered."² So in *Donnall's* case, Mr. Justice Abbott, in summing up, said to the jury that there were two important questions: first, did the deceased die of poison? and if they should be of opinion that she did, then, whether they were satisfied from the evidence that the poison was administered by the prisoner or by his means? There were some parts of the evidence which appeared to him equally applicable to both questions, and those parts were what related to the conduct of the prisoner during the time of the opening and inspection of the body; his recommendation of a shell and the early burial; to which might be added the circumstances, not much to be relied upon, relative to his endeavors to evade his apprehension. His lordship also said, as to the question whether the deceased died by poison, "in considering what the medical men said upon the one side and the other, you must take into account the conduct of the prisoner in urging a hasty funeral, and his conduct in throwing away the contents of the jug into the chamber utensil."³ Lord Chief Justice Campbell, in his charge to the jury in *Palmer's* case, said that "in cases of this sort the evidence had often been divided into medical and moral evidence; the medical being that of the scientific men, and the moral the circumstantial facts which are calculated to prove the truth of the charge against the party accused. They cannot," he continued, "be finally separated in the minds of the jury, because it is by the combination of the two species of evidence that

¹ *Brown v. State*, 88 Ga. 257.

² Gurney's Short-hand Report, *ut supra*, p. 53.

³ Frazer's Short-hand Rep., *ut supra*, pp. 127, 177.

their verdict ought to be found. In this case you will look at the medical evidence to see whether the deceased, in your opinion, did die by strychnia or by natural disease; and you will look at what is called the moral evidence, and consider whether that shows that the prisoner not only had the opportunity, but that he actually availed himself of that opportunity, to administer to the deceased the deadly poison of which he died." His lordship also said that "it was impossible they should not pay attention to the conduct of the prisoner, and that there were some instances of his conduct as to which they would say whether they belonged to what might be expected from an innocent or a guilty man. He was eager to have the body fastened down in the coffin. Then with regard to the betting-book, there is certainly evidence from which you may infer that he did get possession of the deceased's betting-book, and that he abstracted it and concealed it. Then, gentlemen, you must not omit his conduct in trying to bribe the post-boy to overturn the carriage in which the jar was being conveyed to be analyzed in London, and from which evidence might be obtained of his guilt. Again, you find him tampering with the post-master, and procuring from him the opening of a letter from the person who had been examining the contents of the jar, to the attorney employed in the case. And, then, gentlemen, you have tampering with the coroner, and trying to induce him to procure a verdict from the coroner's jury which would amount to an acquittal. These are serious matters for your consideration, but you, and you alone, will say what inference is to be drawn from them. If not answered, they certainly present a serious case for your consideration."¹

One accused of an attempt to poison the members of a family, by placing the poison in the flour which was to be used for the morning meal, had hung around the house for several hours after the meal, and asked if a certain person was sick, though nothing of the sickness had been told her.² When the prisoner on a trial for poisoning his wife had sent her the poison from a distance and told a witness that his wife was dead, when he had not, and could not have received any communica-

¹ See Report of Reg. v. Palmer at pp. 308 and 320. Further on this subject see *State v. Baldwin*, 86 Kan. 1, where the conduct of the prisoner subsequent to the death of his victim told strongly against him.

² *Brown v. State*, 88 Ga. 257.

tion to that effect, this was a circumstance which must have had, and justly, great weight with the jury, in determining the question of guilt.¹ And in the celebrated *Maybrick case* it was shown on the trial that the defendant had told her paramour that her husband was "sick unto death," when as yet it had not appeared that his illness was incurable. In *Stephens'* case it was a circumstance much commented on that the defendant left his wife's room while she was in her dying agony and remained away several hours.² On the trial of *Adelaide Bartlett* for the murder of her husband by poison an impression was created favorable to the accused by the fact that she had assiduously cared for the deceased during the long course of his illness, and had constantly manifested a strong and tender affection for him.³

Among the most important circumstances of moral conduct, and in analogy with the rules which prevail in the proof of the *corpus delicti* in other cases, may be mentioned former acts of poisoning, or attempts to poison, whether the same individual, or other members of the same family, where such successive administrations throw light upon the particular act which forms the subject of inquiry. On a trial for murder by the administration of prussic acid in porter, evidence was admitted that the deceased had been taken ill several months before, after partaking of porter with the prisoner.⁴ And upon the trial of a woman for the murder of her husband by arsenic, in September, evidence was admitted of arsenic having been taken by two of her sons, one of whom died in December, and the other in March following, and also by a third son, who took arsenic in April following, but did not die. Evidence was also admitted of a similarity of symptoms in the four cases, that the prisoner lived in the same house with her husband and sons, and prepared their tea, cooked their victuals, and distributed them to the four parties. Lord Chief Baron Pollock said his opinion was that evidence was receivable that the deaths of two sons, and the illness of the third, proceeded from the same cause, namely, arsenic. The tendency of

¹ *McMeen v. Com.*, 114 Pa. St. 800.

² *People v. Stephens*, 4 Park. Cr. R. 396.

³ *Reg. v. Bartlett*, Cent. Crim. Ct. Sess. Pap. vol. ciii. pt. 618, pp. 725-811. See also *London Lancet*, May 22, 1886.

⁴ *Reg. v. Tawell*, *ut supra*.

such evidence, he said, was to prove, and to confirm the proof already given, that the death of the husband, whether felonious or not, was occasioned by arsenic. In that case he thought it wholly immaterial whether the deaths of the sons took place before or after the death of the husband. The domestic history of the family during the period that the four deaths occurred was also receivable in evidence, to show that during that time arsenic had been taken by four members of it, with a view to enable the jury to determine whether such taking was accidental or not. The evidence, he said, was not inadmissible, by reason of its tendency to prove, or to create a suspicion of a subsequent felony. His lordship, after taking time to consider, refused to reserve the point for the opinion of the judges, under the 11 & 12 Vict. c. 78, and stated that Mr. Baron Alderson and Mr. Justice Talfourd concurred in opinion with him.¹

In a case where a man and his wife were indicted for the murder of the male prisoner's mother, by poisoning, evidence was admitted for the purpose of rebutting the inference that the arsenic was taken accidentally, to show that some months previously the first wife of the male prisoner had died by poison; and that the woman who waited on the mother and tasted her food was several times taken sick; that the food was always prepared by the female prisoner; and that on no occasion were the prisoners affected, nor did they show symptoms of poison.²

Mrs. Robinson was convicted of the murder of her brother-in-law, and it was supposed that the motive was that she might get possession of the insurance money. The beneficiary of the policy was, in the first instance, the wife of the deceased, who had died a short time before under suspicious circumstances. On the death of the deceased's wife, the accused became entitled to the proceeds of the policy. It was held that if it were shown that the accused knew this fact, and that she had, before the death of the deceased's wife, formed the intention of getting possession of the insurance money, then the circumstances tending to prove that the deceased's wife came to her death

¹ Reg. v. Geering, 27 L. J. M. C. 215. And see Reg. v. May, 1 Cox's C. C. 236; Reg. v. Calder, Id. 848, and the language of Mr. Baron MAULE, in Reg. v. Dossett, 2 C. & K. 306.

² Reg. v. Garner *et ux.*, 4 F. & F. 846. See also Reg. v. Cotton, *supra*.

by poison administered by the accused might be shown.¹ On the trial of *Dr. Goersen* for the murder of his wife by administering arsenic, the theory of the Commonwealth was, that the defendant wished to get possession of some property, belonging to his wife, and in which her mother had an interest. To do this he had to get rid of both his wife and her mother. It was then admissible to show that the mother had died a few days before the wife, that the defendant had attended her in her last illness, and that the body was exhumed and examined, and found to contain arsenic, and to show such other circumstances as tended to rebut the theory of accident or suicide.²

But, nevertheless, moral facts apparently calculated to create the greatest suspicion may not be of a suspicious nature, or may be too fallacious and uncertain to justify conviction, especially where the *corpus delicti* is matter of inference only, and not established on a basis of independent evidence. Justice requires that such facts should be interpreted in a spirit of candor, and with proper allowance for the weaknesses of men who may be suddenly placed in circumstances of suspicion and difficulty. It is well known, for example, that many persons, more especially in the humbler classes, feel great repugnance to permit the bodies of their friends to be subjected to anatomical examination. The manifestation of such repugnance is a fact to be taken into account, like all other facts. But although in the case of violent or sudden death, and particularly when caused by poison, it must be known that the *post-mortem* examination is of the highest importance, it by no means follows that objection to permit such examination proceeds from the consciousness of guilt. In a case of this kind, Mr. Baron Rolfe said that the question was, from what motive the reluctance arose. On the one hand, it was suggested that it was because the prisoner did not wish the cause of his wife's death to be investigated, being afraid it would be discovered that she had died from arsenic; on the other, that his reluctance arose from his horror of the notion of his wife's dead body being taken up and exposed to the investigation of the surgeons, at which the feelings were apt to revolt. Many persons, no doubt, feel very great horror at the notion of such things being done to themselves, or those connected with them,

¹ Com. v. Robinson, 146 Mass. 571.

² Goersen v. Com., 106 Pa. St. 477.

whilst others, again, were indifferent on the subject, leaving their own bodies to be dissected. But few persons liked to have their wives or their daughters so exposed; the prisoner, said the learned judge, might not be one of them, and his feelings on that subject might have promoted the remark alleged against him; and surely he must have known that any reluctance expressed by him to an inquiry, or wish to stop it, would only tend to make those who were about to make it persevere.¹

An observation of Mr. Justice Stephen will be appropriate here. Speaking on the subject of prisoners as witnesses, that eminent criminal lawyer remarked that though "it might seem paradoxical to say so, it was nevertheless true, that the class of accused persons who will get least advantage from having their mouths opened are those who are entirely innocent of, and unconnected with, the crime, of which they are charged—persons who have nothing to conceal and nothing to explain." In connection with this it may be noticed as a remarkable circumstance that when Mrs. Maybrick made her statement it was not established beyond a doubt that the deceased died of arsenical poisoning. Even if he died from arsenic, it was not shown that Mrs. Maybrick administered it; there was no proof that she had arsenic in her possession, except in the form of fly-papers, and it was clearly shown that the deceased was in the habit of taking arsenic. Thus there was a strong probability that the prisoner would be acquitted. But when in the course of her statement she admitted that she had put a white powder in the meat, it seemed that all hope was shut out.²

¹ *Reg. v. Graham, ut supra.*

² Extract from Solicitors' Journal, in 11 Crim. L. Mag. 884.

CHAPTER III.

CASES IN ILLUSTRATION OF THE FOREGOING RULES.

AN analysis of some of the most remarkable recorded cases of criminal poisoning which have occurred in our judicial annals, will form an interesting commentary upon the general rules of evidence, and more especially in their application to the interpretation of moral inculpatory facts.

John Donellan, Esq., was tried at Warwick Spring Assizes, 1781, before Mr. Justice Buller, for the murder of Sir Theodosius Boughton, his brother-in-law, a young man of fortune, twenty years of age, who up to the moment of his death had been in good health and spirits, with the exception of a trifling venereal ailment, for which he occasionally took a laxative draught. Mrs. Donellan was the sister of the deceased, and together with Lady Boughton, his mother, lived with him at Lawford Hall, the family mansion. On attaining twenty-one, Sir Theodosius would have been entitled absolutely to an estate of £2,000 per annum, the greater part of which, in the event of his dying under that age, would have descended to the prisoner's wife. For some time before the death of Sir Theodosius, the prisoner had on several occasions falsely represented his health to be very bad, and his life to be precarious, and not worth a year's purchase, though to all appearances he was well and in good health. On the 29th of August the apothecary in attendance sent him a mild and harmless draught, to be taken the next morning. In the evening the deceased was out fishing, and the prisoner told his mother that he had been out with him, and that he had imprudently got his feet wet, both of which representations were false. When he was called on the following morning, he was in good health; and about seven o'clock his mother went to his chamber for the purpose of giving him his draught, of the smell and nauseousness of which he immediately com-

plained, and she remarked that it smelt like bitter almonds. In about two minutes he struggled very much, as if to keep the medicine down, and Lady Boughton observed a gurgling in his stomach; in ten minutes he seemed inclined to doze, but in five minutes afterwards she found him with his eyes fixed, his teeth clenched, and froth running out of his mouth, and within half an hour after taking the draught he died. Lady Boughton ran downstairs to give orders to a servant to go for the apothecary, who lived about three miles distant; and in less than five minutes the prisoner came into the bedroom, and after she had given him an account of the manner in which Sir Theodosius had been taken, he asked where the physic-bottle was, and she showed him the two bottles. The prisoner then took up one of them and said, "Is this it?" and being answered "Yes," he poured some water out of the water-bottle, which was near, into the phial, shook it, and then emptied it into some dirty water, which was in a wash-hand basin. Lady Boughton said, "You should not meddle with the bottle;" upon which the prisoner snatched up the other bottle and poured water into that also, and shook it, and then put his finger to it and tasted it. Lady Boughton again asked what he was about, and said he ought not to meddle with the bottles: on which he replied he did it to taste it, though he had not tasted the first bottle. The prisoner ordered a servant to take away the basin, the dirty things, and the bottles, and put the bottles into her hands for that purpose; she put them down again on being directed by Lady Boughton to do so, but subsequently, while Lady Boughton's back was turned, removed them on the peremptory order of the prisoner. On the arrival of the apothecary, the prisoner said the deceased had been out the preceding evening, fishing, and had taken cold, but he said nothing of the draught which he had taken. The prisoner had a still in his own room, which he had used for distilling roses; and a few days after the death of Sir Theodosius he brought it, full of wet lime, to one of the servants, to be cleaned. The prisoner made several false and inconsistent statements to the servants and others as to the cause of the young man's death, attributing it at one time to his having been out late, fishing, and getting his feet wet, and at another to the bursting of a blood-vessel, and again to the malady for which he was under treatment, and

the medicine given to him. On the day of his death he wrote to Sir William Wheeler, his guardian, to inform him of the event, but made no reference to its suddenness. The coffin was soldered up on the fourth day after the death. Two days afterwards, Sir William, in consequence of the rumors which had reached him of the manner of his friend's death, and that suspicions were entertained that he had died from the effects of poison, wrote a letter to the prisoner, requesting that an examination might take place, and mentioning the gentlemen by whom he wished it to be conducted. He accordingly sent for them, but did not exhibit Sir William Wheeler's letter, alluding to the suspicion that the deceased had been poisoned, nor did he mention to them that they were sent for at his request. Having been induced by the prisoner to suppose the case to be one of ordinary sudden death, and finding the body in an advanced state of putrefaction, the medical gentlemen declined to make the examination, on the ground that it might be attended with personal danger. On the following day a medical man, who had heard of their refusal to examine the body, offered to do so ; but the prisoner declined his offer, on the ground that he had not been directed to send for him. On the same day the prisoner wrote to Sir William a letter, in which he stated that the medical men had fully satisfied the family, and endeavored to account for the event by the ailment under which the deceased had been suffering ; but he did not state that they had not made the examination. Three or four days afterwards, Sir William, having been informed that the body had not been examined, wrote to the prisoner insisting that it should be done, which, however, he prevented, by various disingenuous contrivances, and the body was interred without examination. In the meantime, the circumstances having become known to the coroner, he caused the body to be disinterred and examined on the eleventh day after death. Putrefaction was found to be far advanced ; and the head was not opened, nor the bowels examined, and in other respects the examination was incomplete. When Lady Boughton, in giving evidence before the coroner's inquest, related the circumstances of the prisoner having rinsed the bottles, he was observed to take hold of her sleeve, and endeavor to check her ; and he afterwards told her that she had no occasion to have mentioned that circumstance, but only to answer such

questions as were put to her; and in a letter to the coroner and jury, he endeavored to impress them with the belief that the deceased had inadvertently poisoned himself with arsenic, which he had purchased to kill fish. Experiments made by the administrations of laurel-water on various animals produced convulsions and sudden death, and on opening one of them a strong smell of laurel-water was perceived. Upon the trial, four medical men, three physicians and an apothecary, were examined on the part of the prosecution, and expressed a very decided opinion, mainly grounded upon the symptoms of the suddenness of the death, the *post-mortem* appearances, the smell of the draught as observed by Lady Boughton, and the similar effects produced by experiments upon animals, that the deceased had been poisoned with laurel-water; and one of them stated that, on opening the body, he had been affected with a peculiar biting, acrimonious taste in the hands and mouth, like that which affected him in all the subsequent experiments with laurel-water. An eminent surgeon and anatomist, examined on the part of the prisoner, stated a positive opinion that the symptoms did not necessarily lead to the conclusion that the deceased had been poisoned, and that the appearances presented upon dissection explained nothing but putrefaction.

Mr. Justice Buller, in his charge to the jury, called their attention to the suddenness of the death immediately after the administration of a draught by the prisoner, to the opinions of the medical witnesses that there was nothing to lead them to attribute death to any other cause than that draught, to the prisoner's misrepresentations as to the deceased's state of health at a time when he appeared to others to be in good health and spirits, to his contrivances to prevent the examination of the body, and emphatically to the fact of his having rinsed out the bottle from which the draught had been taken, "which," said the learned judge, "does carry with it strong marks of knowledge by him that there was something in that bottle which he wished should never be discovered;" and finally, to his attempts to check the witness who spoke to that circumstance while giving her evidence before the coroner. The prisoner was convicted and executed.

This trial has given rise to much difference of opinion, and assuredly the scientific evidence was very imperfect and un-

satisfactory. But the manner in which death occurred, at the very instant of taking the draught from the hand of the prisoner, was all but conclusive that it contained some poisonous ingredient which was the cause of death ; and though the mere coincidence of the two events would not alone have been exclusive of the hypothesis of a sudden death from accident or natural cause, the conjunction of those events with so many circumstances of moral conduct of deep inculpatory import, could admit of explanation only on the hypothesis of the prisoner's guilt. It is impossible to regard those circumstances in any other light than as the necessary indications, on the ordinary principles of human nature, of the moral causal origin of the fatal catastrophe.

Robert Sawle Donnell, a surgeon and apothecary, was tried at Launceston Spring Assizes, 1817, before Mr. Justice Abbott, for the murder of Mrs. Elizabeth Downing, his mother-in-law.

The prisoner and the deceased were next-door neighbors, and lived upon friendly terms ; and there was no suggestion of malice, nor could any motive be assigned which could have induced the prisoner to commit such an act, except that he was in somewhat straitened circumstances, and in the event of his mother-in-law's death would have become entitled to a share of her property. On the 19th of October the deceased drank tea at the prisoner's house, which was handed to her by him, and returned home much indisposed, retching and vomiting, with a violent cramp in her legs, from which she did not recover for several days. About a fortnight afterwards, after returning from church, and dining at home on boiled rabbits smothered with onions, upon the invitation of her daughter she drank tea in the evening at the prisoner's house, with a family party. The prisoner on this occasion also handed to the deceased cocoa and bread and butter, proceeding towards her chair by a circuitous route ; but it was stated to have been his habit to serve his visitors himself, and not to allow them to rise from their chairs. When Mrs. Downing had drunk about half of her second cup, she complained of sickness and went home, where she was seized with retching and vomiting, attended with frequent cramps ; and then a violent purging took place, and at eight o'clock the next morning she died. None of the other persons who had been present on either of these occasions were taken ill. To a physician called in by the

prisoner two or three hours before her death, he stated that she had had an attack of *cholera morbus*. The nervous coat of the stomach was found to be partially inflamed or stellated in several places, and the villous coat was softened by the action of some corrosive substance; the blood-vessels of the stomach were turgid, and the intestines, particularly near the stomach, inflamed. The contents of the stomach were placed in a jug, in a room to which the prisoner (to whom at that time no suspicion attached) had access, for examination, but he clandestinely threw them into another vessel containing a quantity of water. The prisoner proposed that the body should be interred on the following Wednesday, assigning as a reason for so early an interment that from the state of the corpse there would be danger from keeping it longer. This representation was entirely untrue. He also evinced much eagerness to accelerate the funeral, urging the person who had the charge of it and the men who were employed in making the vault to unusual exertions. The physician called in to the deceased concluded, from the symptoms, the shortness of the illness, and the morbid appearances, that she had died from the effect of some active poison; and in order to discover the particular poison supposed to have been used, he applied to the contents of the stomach the tests of the ammoniacal sulphate of copper, or common blue vitriol, and the ammoniacal nitrate of silver, or lunar caustic, in solution, which severally yielded the characteristic appearances of arsenic, the sulphate of copper producing a green precipitate, whereas a blue precipitate is formed if no arsenic is present, and the nitrate of silver producing a yellow precipitate, instead of a white precipitate, resulting if no arsenic is present. He stated that he considered these tests conclusive and infallible, and that he had used them because they would detect a minuter portion of arsenic; on which account he considered them to be more proper for the occasion, as, from the smallness of the quantity, from the frequent vomitings and purgings, and the appearances of the tests, he found there could not be much. Concluding that bile had been taken into the stomach, he mixed some bile with water, and applied to the mixture the same tests, but found no indication of the presence of arsenic; from which he inferred that the presence of bile would not alter the conclusion which he had previously drawn. Having been informed that the deceased had eaten

onions, he boiled some in water; and after pouring off the water in which they were boiled, he poured boiling water over them and left them standing for some time, after which he applied the same tests to the solution thus procured, and ascertained that it did not produce the characteristic appearances of arsenic. The witness, upon his cross-examination, admitted that the symptoms and appearances were such as might have been occasioned by some other cause than poisoning; that the reduction test would have been infallible; and that it might have been adopted in the first instance, and might also have been tried upon the matter which had been used for the other experiments. Upon his re-examination he accounted for his omission of the reduction test by stating that the quantity of matter left after the frequent vomitings and the other experiments would have been too small, and that it would not have been so correct to use the matter which had been subjected to the preceding experiments.

Several medical witnesses called on the part of the prisoner stated that the symptoms and morbid appearances, though they were such as might and did commonly denote poisoning, did not exclude the possibility that death might have been occasioned by *cholera morbus* or some other disease; that the tests which had been resorted to were fallacious, since they had produced the same characteristic appearances upon their application to innocent matter, namely, the sulphate of copper a green, and the nitrate of silver a yellow precipitate, on being applied to an infusion of onions; and that the experiment with the bile was also fallacious, since from the presence of phosphoric acid, which is contained in all the fluids of the human body, the same colored precipitate would be thrown down by putting lunar caustic into a solution of phosphate of soda. The learned judge, in his charge to the jury, said that none of the evidence of the witnesses for the prisoner went to show that the tests employed by the medical witnesses on the other side would not prove that arsenic was there if it were really there; that the experiments made by the witnesses for the prisoner were made with onions in a different state from what onions boiled with rabbits are, as by that mode could be got a great portion of the juice or strength of the onions, in water, whereas in regard to onions prepared for the table, or boiled with a considerable quantity of water, a good portion of their

juice is withdrawn from them ; that as to the experiment with the bile, if there were no phosphoric acid in the stomach of the deceased, or no quantity of it sufficient to produce that appearance, whatever might have been the appearance if sufficient were put in, then the experiment was tried on something that did not contain a sufficient quantity of that matter ; that although the same result might be produced by that matter if there, yet if there is no reason to suppose that that matter was there, or there in sufficient quantity, then he thought the suspicion that arsenic was there was very strong. His lordship also said, "If the evidence as to the opinions of the learned persons who have been examined on both sides should lead you to doubt whether you should attribute the death of the deceased to arsenic having been administered to her, or to the disease called *cholera morbus*, then as to this question as well as to the other question the conduct of the prisoner is most material to be taken into consideration ; for he, being a medical man, could not be ignorant of many things as to which ignorance might be shown in other persons : he could hardly be ignorant of the proper mode of treating *cholera morbus* ; he could not be ignorant that an early burial was not necessary ; and when an operation was to be performed in order to discover the cause of the death, he should not have shown a backwardness to acquiesce in it ; and when it was performing, and he attending, he could not surely be ignorant that it was material for the purposes of the investigation that the contents of the stomach should be preserved for minute examination."¹ His lordship also said, "The conduct of the prisoner, his eagerness in causing the body to be put into a shell, and afterwards to be speedily interred, was a circumstance most material for their consideration, with reference to both the questions he had stated ; for although the examination of the body in the way set forth, and the experiments that were made, might not lead to a certain conclusion as to the charge stated, that the deceased got her death by poison administered to her by the prisoner, yet if the prisoner as a medical man had been so wicked as to administer that poison, he must have known that the examination of the body would divulge it."² Notwithstanding this adverse charge of the learned judge, the prisoner was acquitted.

¹ Frazer's Short-hand Rep. 161.

² Id. 170.

A medical man was tried for the murder of his wife, by the administration of prussic acid. They left their place of residence at Sunderland, on a journey of pleasure to London, where they arrived on the 4th of June, and went into lodgings. On the morning of the 8th, being the Saturday after their arrival in town, the prisoner rang the bell for some hot water, a tumbler, and a spoon, and he and his wife were heard conversing in their chamber. About a quarter before eight he called the landlady upstairs, saying that his wife was very ill, and she found her lying motionless on the bed, with her eyes shut and her teeth closed, and foaming at the mouth. The prisoner said she had had fits before, but none like this, and that she would not come out of it; and on being urged to send for a doctor, he said he was a doctor himself, and should have let blood before, but that there was no pulse, and that this was an affection of the heart, and that her mother died in the same way nine months before, and he put her feet and hands in warm water, and applied a mustard plaster to her chest. In the meantime a medical man was sent for, but she died before his arrival. There was a tumbler close to the head of the bed, about one-third full of a clear white fluid, and an empty tumbler on the other side of the table, and a paper of Epsom salts. In reply to a question from the medical man, the prisoner stated that the deceased had taken nothing but a little salts. On the same morning he ordered a grave for interment on the Tuesday following. The contents of the stomach were found to contain prussic acid and Epsom salts; and it was deposed that the symptoms were similar to those of death by prussic acid, but they might be the effect of any powerful sedative poison, and that the means resorted to by the prisoner were not likely to promote recovery, but that artificial respiration and stimulants were the appropriate remedies, and might probably have been effectual. The prisoner had purchased prussic acid and acetate of morphine on the previous day, from a vender of medicines with whom he was intimate, and he had been in the habit of using these poisons, under advice, for a complaint in the stomach. Two days after the fatal event, he stated to the medical man who had been called in that on the morning in question he was about to take some prussic acid; that on endeavoring to remove the stopper he had some difficulty, and used some force with the handle of a

tooth brush; that the neck of the bottle was broken by the force, and some of the acid spilt; that he placed the remainder in the tumbler, and went into a front room to fetch a bottle in which to place the acid, but instead of doing so, began to write to his friends in the country, when in a few minutes he heard a scream from his wife's bedroom; that he immediately went to her; that she exclaimed that she had taken some hot drink, and called for cold water, and that the prussic acid was undoubtedly the cause of her death. Upon being asked what he had done with the bottle, he said he had destroyed it, and assigned as the reason why he had not mentioned the circumstances before, that he was distressed and ashamed at the consequences of his negligence. According to the opinions of the medical witnesses, after the scream or shriek, volition and sensibility must have ceased, and speech would have been impossible. To various persons in the north of England the prisoner wrote false accounts of his wife's state of health. In one of them, dated from the Euston Hotel, the 6th of June, he stated that she was unwell, and had two medical gentlemen attending her, and that he was apprehensive of a miscarriage. In another, dated the 8th, he stated that he had had her removed to private lodgings, where she was under the care of two medical men, dangerously ill; that symptoms of premature labor had come on, and that one of the medical men pronounced her heart to be diseased. At the date of this letter his wife was cheerful and well, and all these statements respecting her health were false; and in fact they had gone into lodgings on their arrival in London on the 4th. In a letter, dated the 9th, he stated the fact of her death, but without any allusion to the cause of it; which suppression, in a subsequent letter, he stated to have been caused by the desire of concealing the shame and reproach of his negligence. His statement to his landlady that his mother-in-law had died from disease of the heart was a falsehood, he himself having certified to the registrar of burials that bilious fever was the cause of her death. The deceased was entitled to some leasehold property, to which the prisoner would become entitled absolutely if he survived her, and to a copyhold estate which was limited to the joint use of herself and her husband, so that the survivor would take the absolute interest. The motive suggested for the commission of the alleged murder was, that the

prisoner might become at once the absolute owner of his wife's property.

Mr. Baron Gurney said that this case differed from almost every other case he had ever known, in this circumstance, that generally there was a difficulty in ascertaining whether the death had been caused by poison, and whether the poison came from the hands of the person charged with the crime; but that in this case there could be no doubt that the deceased had come to her death by a poison, most certain, fatal, and speedy in its effects, and that it was equally certain that it came from the hands of the prisoner. It had been proved beyond all doubt that the prisoner had bought the poison, and had placed or left it unprotected in the chamber of his wife, and the question was, whether, she having died from poison, it had been administered to her by his hand, or whether he had purposely placed it in her way in order that she might herself take it. The secrets of all hearts were known to God alone, and human tribunals could only judge of those secrets from the conduct of the individual at the time. In this case, the jury had the conduct of the prisoner, his words, his writing, his demeanor, proved before them, and it would be for them to decide, upon the whole case, whether they believed he had administered the poison, or placed it within the reach of the deceased in order that she might take it. If he had done either of those things, he would be guilty of murder; if they thought he had acted incautiously and negligently by leaving the poison in the way he had done, he had not been guilty of murder. He dwelt upon the circumstances that the parties had lived for a year and a half together upon terms of mutual affection, that the marriage took place with the consent of the lady's mother, with whom they had lived till her death, that the visit to London was well known to their friends, and that the place to which she was taken was where he had lodged before, and near the residence of the only two persons with whom he was acquainted in London. When any person committed a heinous crime it was usual and natural, said the learned judge, to look whether there existed any adequate motive to the commission of it. The prisoner being about thirty, and his wife about twenty-two years of age, it would be a good deal to say that the desire to possess her property should be brought forward as a great motive of interest to excite to the commission of such a crime. Nevertheless, it

was sometimes found, as they could not dive into the heart and ascertain motives, that a grave crime might be committed, although no motive for it could be found. Inasmuch as the great question the jury had to decide was the intention of the prisoner, it should be remembered that a man was entitled to a candid construction of his words and actions, particularly if placed in circumstances of great and unexpected difficulty, and they would take care to give what fair allowance they could in putting a construction upon the prisoner's words and actions. He also laid stress upon the conduct of the prisoner to his wife, and his general good character for kindness. He could not conceive the motive which should have induced the prisoner, in the letter posted on the 6th, when his wife was well and cheerful, to write so complete a fabrication, from beginning to end, of her being unwell and attended by two medical men, and the jury would observe that it was written on the very day on which the prisoner had made arrangements for her residence with a friend, during his absence abroad. When the letter of the 8th was written did not appear, but it was proved to have been posted on the evening of that day. If it was written before the death, it told against the prisoner. It concurred with the letter written on the 6th, and practised the same deception, as to the two medical men, upon those to whom it was addressed. The defence was, that the prisoner had been guilty of a lamentable indiscretion ; that a sudden event, fatal to his wife, had happened ; that he was overpowered and overwhelmed by the result of his own carelessness, and that he did not like to divulge the truth. The awkward fact, however, was, that in his last letter he had pursued exactly the same system as that adopted in the letter written two days before. They would recollect, with reference to the letter of the 8th, that on that day he had more than once exclaimed, "This is all my fault." These outbreaks were of some importance for the consideration of the jury in giving, as compared with the letters, all indulgent consideration to any language used by the prisoner, after an event had occurred which placed him in a situation of difficulty and embarrassment. In comparing the statement set up for the defence with the evidence of the medical witnesses, two things were of a good deal of importance. The prisoner's statement was, that when he entered the bed-chamber, his wife told him what had occurred, and that he took the tumbler out

of her hand. The medical men had told the jury that with the scream that had been spoken of, all volition and power of speech would cease; but here it must not be forgotten that the judgment of these gentlemen must be received with this caution, that none of them had ever witnessed the effect of prussic acid on the human frame. It was for the jury to decide whether they were convinced, beyond any reasonable doubt, that the prisoner either administered, or in effect caused to be administered, poison to the deceased; if on the other hand they should be of opinion that he had been merely guilty of indiscretion, and that, in consequence of the sudden and awful event which had occurred, he had been driven to conceal it by falsehood, they would acquit him. No doubt, falsehood often placed persons having recourse to it under awkward and menacing circumstances. In this case, falsehood had been much resorted to. It was shown before the death, in the statement about the two medical men; that falsehood was followed up and repeated in the second letter; another falsehood appeared in the representation that his mother-in-law, who had died of bilious fever, as appeared by an entry in the register under his own hand, had died of disease of the heart. If they thought the case conclusive, however painful it might be, it would be their duty to pronounce the prisoner guilty; but if they thought it left in doubt and mystery, so that they could not safely proceed, they would remember that it was better that many guilty men should escape than that one innocent man should perish. The prisoner was acquitted.¹

Palmer's case is one of the most remarkable ones of this nature on record. The prisoner had been a medical practitioner, but had given up his profession for the pursuits of the turf, in the course of which he became intimate with a young man named Cook, who was addicted to the same pursuits. By his extensive gambling transactions he became involved in great pecuniary difficulties, and was ultimately driven to the desperate expedient of borrowing money at exorbitant rates of interest, and to the commission of forgeries on a large scale. In 1855 he was indebted in about £20,000, borrowed at sixty per cent. interest upon bills, all of which bore the forged acceptances of his mother, and secured in part by the assignment of a policy of assurance for £13,000 on the life of his brother, who died in

¹ Reg. v. Belaney, C. C. C., Aug. 1844.

August of that year. To this source the prisoner had looked for relief from his embarrassments, but the office having become acquainted with circumstances which induced them to dispute the validity of the policy on the ground of fraud, declined to pay the sum assured; and in consequence the holder of some of these bills issued writs against the prisoner and his mother, which was sent into the country, to be served unless he should effect some satisfactory arrangement. Exposure, ruin, and punishment thus became imminent, unless some means could be devised of averting the impending disclosures. On the 13th of November Cook won, by one of his horses and by bets at Shrewsbury races, between £2,000 and £3,000, of which he received £700 or £800 on the course; the remainder was payable in London, on Monday, the 18th. He was greatly excited by his success, and the prisoner and several other persons spent the following evening with him, after the conclusion of the races, at his inn in Shrewsbury. In the course of the evening the prisoner was seen in the passage outside of his own room, holding up a tumbler to a gaslight; after which he went, with the tumbler in his hand, into the room where Cook and his other friends were sitting. Soon afterwards, on drinking some brandy and water, Cook became suddenly ill, with violent vomiting, and it was necessary to call in medical assistance. He said he had been dosed by the prisoner, and handed the money he had about him, between £700 and £800, to a friend to take care of, who returned it to him the next morning, after his recovery. Notwithstanding these suspicious circumstances, such was the prisoner's influence over his infatuated victim, that Cook returned from Shrewsbury to Rugeley in company with him on the evening of Thursday, the 14th, when, on their arrival, the former went to his lodgings at the Talbot Arms, and the prisoner to his own house opposite. On the Saturday and Sunday the prisoner called many times to see Cook, who was repeatedly taken sick and ill after taking coffee and broth from the hands of the prisoner. On Monday (the 18th) he got up much better; and the prisoner called upon him early in the morning, but did not see him again until eight and nine in the evening, having in the interim, as it turned out, been to London. In the course of that evening Cook's medical attendant, who had previously seen him, left at the Talbot Arms a box of morphine pills, which was taken into his bedroom and admin-

istered by the prisoner, soon after which the household was disturbed by screams proceeding from the patient's room, who was found sitting up in bed, in great agony, beating the bed-clothes, gasping for breath, convulsed with a jerking and twitching motion all over his body, and one hand clenched and stiff, but conscious, and calling to those about him to send for the prisoner. In about half an hour the paroxysm subsided, and he became composed. On the morning of Tuesday (the 19th), after taking coffee from the hand of the prisoner, Cook was again affected with violent vomiting, which continued throughout the day ; but in the evening was better, and in good spirits. About seven o'clock he was visited by his medical attendant, and the prisoner urged him to repeat the morphine pills, as on the night before ; and they went together to the surgery, where pills were prepared and delivered to the prisoner, who took them away, and went to Cook's room about eleven o'clock, as was intended and supposed, for the purpose of administering them to him ; so that he had the opportunity in the interval of changing them, which there can be no doubt he did. Cook strongly objected to take them, because he had been made so ill the night before ; but his objections were overcome by the prisoner, and at length he swallowed the pills presented to him. Soon after midnight he became ill with the same agonizing symptoms as on the preceding night, and again desired that the prisoner should be sent for. Such was the rigidity of his limbs that it was found impossible to raise him up, and he asked to be turned over on his side ; after which the action of the heart gradually ceased, and in a quarter of an hour he was a corpse. When dead, the body was bent back like a bow, and if it had been placed upon a level surface, it would have rested upon the head and heels. Upon receiving information of the young man's death, his stepfather, who lived in London, went to Rugeley on Friday, the 22d, to make arrangements for his funeral, and to inquire into the state of his affairs, as well as into the circumstances of his illness. On stating to the prisoner that he understood he knew something of his affairs, he told him that there were £4,000 worth of bills of the deceased's out, to which his name was attached, and that he had got a paper drawn up by a lawyer, signed by the deceased, to show that he had never received any benefit from them. The stepfather then inquired if there were no sporting debts owing to him, to

which the prisoner said there was nothing of the sort ; and on asking about the betting-book, which could not be found, the prisoner said it would be of no use if found, as when a man dies, his bets are done with. Other facts now began to transpire throwing a sinister light upon the mysterious events of the last few days. It was discovered that the prisoner had procured three grains of strychnia on the evening of Monday, and a second quantity of six grains on the following day ; that he had been seen to search the pockets, and under the pillow and bolster of the unfortunate man before his body was cold ; that although his betting-book was kept on the dressing-table of the deceased's bedroom, and was seen there on the previous night, it was never seen after his death ; that the prisoner handed to a friend of the deceased five guineas as the whole of the money that was found belonging to him ; that he had been to London on Monday, the day before the death, and procured payment of upwards of £1,000 on account of the wagers won by the deceased at Shrewsbury, and appropriated the amount in payment of his own losses, and in part payment of the forged acceptances on which writs had been issued ; that before the races he was short of money, and had borrowed £25, and lost largely at the races, but had subsequently paid considerable sums to various other creditors ; that two or three days after Cook's death he had endeavored to obtain the attestation by an attorney to a forged acknowledgment in the name of the deceased that £4,000 of bills had been negotiated by the prisoner for his benefit, and finally had prevailed upon the medical man who had attended the deceased, who was of a very advanced age, to certify that he had died of apoplexy. A *post-mortem* examination was made, at which the prisoner was present, and the stomach and intestines were placed in a jar to be taken to London for examination. While the operation was going on, the prisoner pushed against the medical men engaged in it, so as to shake a portion of the contents of the stomach into the body. The jar was then covered with parchment, tied down, and sealed and placed aside ; and while the attention of the medical men was still engaged in examining the body, the prisoner removed the jar to a distance near a door not the usual way out of the room, and it was found that two slits had been cut with a knife through the double skin which formed the covering. The prisoner having learned that the jar was to

be sent to London the same evening, offered the driver who was to carry the persons in charge of it to the railway station £10 to upset the carriage and break the jar. The analytical chemists to whom the stomach and intestines, and subsequently other parts of the body were sent, found traces of antimony, but none of strychnia, or any other poison; and sent their report by post, directed to the attorney at Rugeley employed in the investigation. The prisoner incited the postmaster to betray to him the contents of this report; and wrote a confidential letter to the coroner, to whom during the course of the inquiry he sent presents of fish and game, stating that he had seen it in black and white that no strychnia, prussic acid, or opium had been found, and expressing his hope that on the next day, to which the inquest stood adjourned, the verdict would be that of death from natural causes. The coroner's jury found a verdict of wilful murder against the prisoner. Upon the trial the chemical witnesses examined on the part of the prosecution stated that the stomach and intestines were received in an unfavorable state for finding strychnia had it been there, the stomach having been cut from end to end, and the contents gone, and the mucous surface, in which any poison, if present, would be found, lying in contact with the intestines and their succulent contents, and shaken together; that the non-discovery of strychnia was not conclusive that death had not been caused by that poison, inasmuch as they had failed to discover it in animals killed for the purpose of experiment; that if a minimum dose is administered, it disappears by absorption into the blood, but that it is discoverable, and had been discovered, when administered to animals in excess of the quantity required to destroy life, and that there is no known process by which it can be discovered in the tissues, if present there only in a small quantity. On the other hand, witnesses were called on behalf of the prisoner, who disputed the theory of absorption, and stated that strychnia, if present, is always discoverable, not only in the blood and in the stomach and intestines and their contents, but also in the tissues; that there was nothing in the condition of the parts of the body submitted to examination to preclude the detection of strychnia; and that if present it might have been found, even if it had been administered in a minimum dose, though on this latter point there was some difference of opinion among them. Numerous

medical witnesses of the highest professional experience and character, called on the part of the Crown, deposed that many of the symptoms, especially in the progress and termination of the attack, were not those of any of the ordinary forms of tetanus, idiopathic or traumatic, or of any known disease of the human frame, but were the peculiar characteristics of poisoning by strychnia. Nor were there in these respects any such differences between their opinions and those of many respectable professional witnesses called on the part of the prisoner, as might not be accounted for by the imperfect state of knowledge of all the forms of tetanic affection, or by the obscurities of physiological and pathological science. Of the numerous professional witnesses examined on behalf of the prisoner, some ascribed the symptoms to tetanic affection; others of them to various forms of disease from which they were shown to be clearly distinguishable; while others again ascribed them to physical causes absolutely absurd and incredible. The contradictions and inconsistencies in the testimony of some of the prisoner's witnesses, and their obtrusive zeal and manifest purpose of obtaining an acquittal, deprived it of all moral effect, and drew down upon several of them the severe reprehension of the court. After a protracted trial of twelve days, the prisoner was found guilty, and was executed pursuant to his sentence;¹ and there is no doubt that this was only one of several murders perpetrated by this great criminal, by the same nefarious means, for the purpose of obtaining money secured by fraudulent life assurances.²

In March, 1882, George Henry Lawson, a surgeon, was indicted for the wilful murder of his brother-in-law, Percy Malcolm John. Percy John was a cripple with curvature of the spine and paraplegia. He had property to the extent of £3,000, half of which at his death would revert to the prisoner's wife. For three years prior to his death John had been attending a school kept by a Mr. W. H. Bedbrook. On December 3d, 1881, John was, with the exception of his paralysis, in good general health, and had taken his meals with Mr. Bedbrook and others.

¹ Short-hand Report, *ut supra*, and Sess. Pap.

² See An. Reg., 1855, p. 190. The technical nature of the evidence in Smethurst's case, *ut supra*, would render it inapplicable in illustration of legal principles, even if doubt had not been thrown upon the verdict by the grant of a pardon.

On that day Lawson called on John about 7 p. m., and their interview took place in the presence of Mr. Bedbrook. The last named gentleman offered Lawson some wine, which he accepted, and Lawson then asked for some sugar to destroy the alcoholic effects of the wine, which he said was rather strong. On a basin of white sugar being brought, Lawson put some of it into his sherry. Lawson then produced a Dundee cake and some sweets, of which all three partook. In a few minutes Lawson produced a box of gelatine capsules from his pocket, and said: "Oh, by the way, Mr. Bedbrook, when I was in America I thought of you and your boys. I thought what excellent things these capsules would be for your boys to take nauseous medicines in." He then gave a capsule to Mr. Bedbrook, and filling another with sugar handed it to John, saying, "Here, Percy, you are a swell pill-taker; take this and show Mr. Bedbrook how easily it may be swallowed." John swallowed the capsule. The prisoner in three or four minutes said: "I must be going," and immediately left the house. In less than an hour John complained of heartburn, and soon after said, "I feel as I felt after my brother-in-law had given me a quinine pill at Shanklin." He was carried up to his bedroom, and about 9 p. m. was found vomiting and in great pain. He complained that his "throat appeared to be closing, and the skin of his face felt drawn up." At 11:30 the same evening he died. The symptoms indicated the presence of aconite. And this is a substance exceedingly difficult of detection. But the analyses of the viscera and vomit were conducted by two experienced chemists, and they obtained an extract which, when placed upon the tongue, produced a numb, tingling sensation, and a small quantity of which, injected under the skin of a mouse, killed it in a few minutes, the symptoms being exactly similar to those produced by injecting a minute quantity of a solution of aconitine. These are considered absolutely certain tests.

It appeared that in the beginning of 1881 Mr. Bedbrook had received from Lawson, who was then in America, a box containing a dozen pills, and a letter, in which Bedbrook was requested to give the pills to John, as Lawson had heard of cases in America similar to that of John being benefited by the pills in question. The deceased took one of the pills, and the next morning complained of feeling very unwell, and said he should

take no more of the pills. On August 28th Lawson bought three grains of sulphate of atropine and one grain of aconitine from a druggist of Ventnor, and on the next day, Percy John, who was staying at that time in Ventnor, was taken ill with diarrhoea and prostration, and a feeling "as if he were paralyzed all over." Lawson was, at this time, living with his father in Ventnor, and was in the habit of going to the house where John was living, and, as was shown, had actually seen him on the date last mentioned. On October 13th the prisoner bought of another druggist in Ventnor twelve quinine powders. John at the time of his death was taking quinine powders supplied to him by Lawson. On November 11th, Lawson had purchased from still another druggist in Ventnor half an ounce of a mixed solution of morphia and atropia, and on the 16th of November he bought a similar quantity of the same solution. On this last mentioned date he asked also for five grains of digitaline, which was not given to him because the sample in stock was not thought to be good. On the 20th of November he asked for one grain of aconitine, which was refused him. From another druggist he purchased two grains of aconitine on November 24th. Among the effects of the deceased were found quinine powders numbered from 1 to 20. Three of these powders differed from the rest, having an admixture of a pale fawn-colored substance, and all contained aconitine. One of those powders contained 83-100 of a grain of aconitine and 96-100 of a grain of quinine. One-fiftieth of a grain of the aconitine killed a mouse in six minutes and a half. One of the pills sent by Lawson from America was found to contain nearly half a grain of aconitine. Some of it injected into the back of a mouse killed the animal in less than five minutes, and the aconitism produced by a small quantity on the tongues of the experimenters lasted seven hours. The defence introduced no witnesses, and the counsel for the prisoner was unable to do anything to lessen the weight of the evidence, and the accused was convicted.¹

One of the earliest cases in this country to attract wide-spread attention to this subject was the case of *People v. Stephens*, already referred to.² James Stephens was tried in March, 1859,

¹ These facts are gleaned from a report of the case in *The Lancet*, 1882, vol. 1, 455.

² 4 Park. Cr. R. 896.

for the murder of his wife. The accused and the deceased were married in Ireland about 1849. Previous to the marriage the deceased had lived with her brother, who had living with him at the same time his two daughters, the one about sixteen and the other about eleven years of age. At the time of the marriage the deceased was thirty-six years of age, and the accused twenty-three. The newly married couple soon emigrated to New York, and shortly after becoming settled in that city invited the eldest of the wife's nieces, just mentioned, to pay them a visit. The young woman reached New York the day after the birth of a daughter to her aunt, and immediately entered the household, where she remained for a considerable time while learning the trade of a dressmaker. She at length procured a situation in a private family, with whom she remained three years. During a period when the family were out of town Stephens paid her a visit at the house, bringing with him a bottle of wine. She testified that on this occasion the prisoner attempted to violate her person and desisted from his purpose only on account of her threatened screams. This happened about September, 1856. About April, 1857, the younger niece, having been advised to take a sea-voyage for her health, and having received an invitation from Stephens and his wife to visit them for a year, arrived in New York and went to her aunt's house, where she was joined by her elder sister. From that time on the two sisters slept together in the house of the prisoner. In the following August, according to the testimony of the two sisters, Stephens having dressed himself to attend a funeral, refused to allow his wife to accompany him, and words having passed, struck her a blow in the eye. One of the sisters testified that about the same time she heard the accused say that he wished his wife dead, or out of the way. And according to the testimony of both sisters, he made no secret at this time of his unkind feelings towards his wife, and treated her with much roughness and disrespect, both in word and manner, while he evinced, as some of his expressions seemed to prove, a marked partiality toward one of the nieces. He dwelt particularly upon the disparity in the ages of himself and wife, she being at that time about forty-five, while he was only thirty-two. When he accompanied her it was a source of much annoyance to him that people might say she looked old enough to be his mother. Other witnesses, however, testified that the

kindest relations always existed between the defendant and his wife. A druggist testified that about this time—which was about six weeks before the death of the prisoner's wife—he sold the prisoner half an ounce of white arsenic, and that in the course of the ensuing week he sold him a like quantity. The testimony of the prisoner's relatives, touching the use to which this poison was put, has been heretofore commented on. About the 6th of September the deceased complained of a slight pain in her chest. Her husband, contrary to her wishes, sent for a physician, who, after two attendances, discontinued his visits, deeming the matter of little consequence. Ten or eleven days thereafter, however, the case assumed a serious form and another doctor was sent for. He found the patient suffering from pain in the pit of the stomach, vomiting, and great debility. At the request of the accused he discontinued his attendances after he had made a few visits, and in about forty hours thereafter the patient was dead. The symptoms, claimed to be those of arsenical poisoning, were detailed to the jury, as likewise the results of the *post-mortem* examination, to which reference has heretofore been made. The body was not exhumed until a year after death, and was found in a remarkable state of preservation, and this latter fact was attributed to the action of the arsenic.

The prosecution claimed that the prisoner having tired of his wife, whose beauty had deteriorated, had wished to form an alliance with his oldest niece, and that he had resorted to poison to remove the great hindrance to the accomplishment of his cherished purpose. The former unsuccessful attempt upon the person of this niece will be remembered. About a month after his wife's death the prisoner made a proposal of marriage to the niece, which being refused, he followed by another unsuccessful attempt upon her person. Shortly after this a suitor for the hand of the niece received an anonymous letter, urging him to discontinue his attentions to the girl, and giving as a reason for the advice the immoral character of the young woman and her criminal intimacy with Stephens. This letter, it was claimed, was written by no other than Stephens himself. One of the nieces testified that it was in the handwriting of the prisoner; and another witness swore that about that time the prisoner came to him with a letter inclosed in an envelope, requesting him to write the address; that he did so, and that

the envelope produced by the person who received the letter was the identical paper. The prisoner was convicted, but on account of his hitherto apparently blameless life many persons were inclined to believe the verdict unjust, and the Governor was petitioned for a pardon. But all efforts to invoke the executive clemency ceased on the discovery of a plan by the prisoner to kill his keeper and effect his escape; and the sentence of the law was fulfilled.

A very important case on account of its consideration of some of the points which have been discussed was the case of *People v. Millard*.¹ Mathew Millard was an enterprising man, engaged quite extensively in several lines of business, in a small town in Michigan. Among other things he carried on an undertaking establishment, which, however, he sold a short time before the fatal illness of his wife. On the 23d of April, 1882, Mrs. Millard was so seriously ill as to consult a physician. The symptoms manifested were similar to those of arsenical poisoning. On May 9th, Mrs. Millard died; and on the 22d of the following August, portions of the body were exhumed and analyzed. A considerable quantity of arsenic was found in the stomach and portions of the rectum, and also in the liver and kidneys. On the 20th of the following September the body was again taken up, and the brain and a portion of the muscles from the calf of the leg removed, and sent to the same chemist for analysis. But in these parts no trace of arsenic was found. The prosecution claimed that the defendant had administered arsenic to his wife, on different occasions, between the 25th of April and the 9th of May, in sufficient quantities to produce death. At the trial the physician who had attended Mrs. Millard testified that he had, as early as the 25th of April, entertained suspicions that his patient was suffering from arsenical poisoning. He, however, took no steps to ascertain the correctness of his suspicions, and administered no antidote. Neither did he attempt to ascertain whether or not there was any arsenic in the matter vomited by the patient. And at the time when others suspected criminal poisoning, he declared a *post-mortem* examination unnecessary.²

¹ 53 Mich. 63.

² The singular course pursued by the physician has been the subject of severe animadversion.

The defence accounted for the presence of the arsenic in the organs analyzed by an attempt to embalm the body undertaken by the defendant and his brother. They swore that a few hours before death they suspended one teaspoonful of arsenic in a teaspoonful of water, and threw a syringe into the mouth, and injected the remainder into the rectum. They did this, they said, because it was intended to send to some distance for a casket, and the burial would be delayed for several days. The defendant, as appeared, had asked an undertaker to embalm the body, and when the latter had replied that he did not know how, had asked him to get arsenic—the undertaker testified that he had been requested to get strychnine—and he would embalm the body himself. Around this point the great interest of the case centred. And the accused was finally acquitted because of the doubt in the minds of the jury as to whether or not the arsenic found in the body was to be accounted for by the embalming process.¹

The elaborate opinion of Mr. Justice Gray in the *Harris* case has been already referred to on several occasions in this chapter. From the same source I have taken the statement of the facts of that *cause célèbre* given below. Carlyle W. Harris was charged with the crime of murder in the first degree, committed upon Helen Neil Potts, by administering to her morphine in a large enough quantity to cause her death. The defendant had formed the acquaintance of the deceased in the summer of 1889, at Ocean Grove, N. J., where her family were residing. When they moved to the city of New York for the winter, the acquaintance continued, and on February 8th, 1890, obtaining permission from her mother to take her to see the Stock Exchange, he went with her before an alderman, and they were married under the assumed names of Charles Harris and Helen Neilson. He was at the time pursuing his studies as a medical student in that city, and he continued to visit the deceased until her family returned, in May following, to Ocean Grove. He followed them there soon afterwards. Mrs. Potts, the mother of the deceased, testified that there was a falling-off in his attentions to the deceased, and a marked

¹ See on this point, *supra*. For the full statement of the facts of this case, see the paper read before the First American International Medico-Legal Congress, reported in the Bulletin of the Congress by Dr. Vaughan, one of the expert witnesses for the defence.

change appeared in his manner towards her, which seemed to worry her. A young friend of the deceased, Miss Schofield, coming to visit her in June, the defendant informed her, upon the occasion of a walk, because he said the deceased had insisted upon it, that they were secretly married. Upon Miss Schofield's saying she should beg the deceased to tell her mother, the defendant became very angry, and said she should not do so, that his prospects would be utterly ruined, and that he would rather kill the deceased and himself than have the marriage made public; and he expressed the wish that the deceased were dead and he were out of it. Later in the day he went out with the deceased, was absent for several hours, and upon their return to the house she appeared pale and ill, and went directly to her room. Shortly after this, in the latter part of June, she went to Scranton, Pa., and visited an uncle, Dr. Treverton. While there Dr. Treverton discovered that she was with child, and treated her accordingly; but subsequently was obliged to remove from her a foetus of five months' formation, and which had been dead for some time. After the operation she recovered her health completely, and returned in the first part of September to Ocean Grove. While she was at Dr. Treverton's, and about the end of July, the defendant came upon a telegram from the deceased, and a letter from Dr. Treverton, and remained a few days. The operation for the removal of the foetus was made while he was there. Dr. Treverton testified to the conversations with the defendant upon the occasion of his visit, in which the defendant said he had performed two operations upon the deceased, and had thought everything was removed. He boasted of his previous intrigues with other women, and of his success in not having had any trouble before. His remarks are unnecessary to be wholly repeated, from their revolting depravity; but, in the course of them, he said he had been "secretly married to at least two young ladies," and by one had a fine child. During the same visit he had a conversation with the witness Oliver, then visiting the Trevertons, in which he spoke boastingly of his experience with women, and of the facility with which he could gain sensual control of them. He said that in two instances he had to overcome their scruples by a secret marriage ceremony, but was ready to stand by them. Upon the witness asking him how he could stand by both, he answered, in substance, that

there would be no trouble, as the first one was glad to be rid of him; and he went on to tell the circumstances of their relations, and, as the final result, that, after a child was born, the woman expressed her disgust with him, and wanted to see no more of him. To neither Trevelin nor Oliver does it appear that he admitted a contract of marriage with the deceased. While the deceased was at Treverton's her mother joined her, and then learned of the secret marriage, and what had happened.

In the first week of September the defendant was at an hotel in Canandaigua, N. Y., under an assumed name, with a young woman named Drew. His conduct towards her was demonstrative in its affection, and her friends there, discovering their illicit relations, compelled him to leave. During his stay, witness Latham overheard a conversation between him and the Drew woman, in which he advised her to marry some old gentleman with lots of money, and, upon her asking what if she did, he is said to have replied, "Oh, we can put him out of the way;" and upon her inquiring how, he further said: "You find the old gentleman, and we will give him a pill. I can fix that." After the return of the deceased and her mother from Scranton they met the defendant in New York City, and lunched together. They talked about the secret marriage, of which the mother had been informed at Scranton. He offered to satisfy Mrs. Potts of its legality, and took her to the office of his lawyer, Mr. Davison. The defendant told her he had burned the original marriage certificate, but sent for and obtained a copy from the records, and, upon Mr. Davison's suggestion, attached to it an affidavit, made by him, stating his marriage with the deceased under assumed names before an alderman. During a conversation at the office he asked if Mr. Potts knew of the marriage. She said it was no time to tell him then, and asked him if he had told his mother. He said, "No, he would not have his family know of it for half a million of dollars." He suggested to Mrs. Potts that if she was so unhappy about the marriage, it could easily be broken, and no one would be the wiser. Upon her expressing herself in indignant refusal of the suggestion, and insisting upon a "ministerial" marriage, he objected to it at the time, alleging as an excuse that it would connect her name with certain club scandals in which he was involved at Asbury Park. He

promised, however, to have the ministerial marriage at any time in the future that Mrs. Potts should say. He expressed his gratification at her not pushing the matter of the marriage at that time; that, if she had, he would have been obliged "to leave everything, and go west." Upon that occasion he suggested putting the deceased at Miss Comstock's school, to fit her, as he said, for the society in which they were to move, to which suggestion Mrs. Potts acceded. At his request she promised to write to Dr. Treverton, and express her satisfaction with the marriage, and to prevent the doctor from making any trouble for him at the medical college, as he had all he could do, he said, to meet the charge of keeping a disorderly house. Upon leaving the lawyer's office, they joined the deceased at the ferry; he crossing with them. The deceased learned of her mother's being satisfied about the marriage, and she seemed to be made very happy in consequence. In December the deceased was placed at school, and, as a friend of the family, the defendant received permission to visit her. During her visit to her home in the holidays he wrote to deceased, asking that no announcement should be made of their engagement at this time. In reply to a letter from Mrs. Potts, in the first week of January, he wrote, suggesting that there should be no further question of marriage for two years longer, and that her daughter should take a collegiate course. About January the 18th or 19th Mrs. Potts wrote to defendant, expressing herself strongly upon the hardship of her daughter's position, with a delay of three years as an unacknowledged wife, and for no apparent reason; that her daughter's illness at Scranton had been commented upon; that if he should die, it would be humiliating to publish a marriage under the circumstances of its contracting; that her husband might meet Dr. Treverton, and be told of the illness at Scranton, and of the doctor's doubts about a marriage. She concluded by asking him to keep his word, and to do as he had promised her, and demanded of him to go, upon the anniversary of the first marriage, February 8th, and be married before a minister of the gospel, and give her the certificate to hold, which she would make public at such time as she chose. To this he replied that he would do all she asked of him, if no other means of satisfying her scruples could be found. On Tuesday, January 20th,—a day after he received Mrs. Potts' letter,—

the defendant went to the shop of McIntyre & Sons, druggists, in New York City, and at first ordered some capsules of sandal-wood to be put up. Upon the clerk's mentioning that it would take some time, he said he could not wait. He then handed the clerk a prescription, asking if it would take long to prepare, and, upon learning that it would take a few minutes, waited for it. It called for twenty-five grains of sulphate of quinine and one grain of sulphate of morphine, mixed in six capsules, with a direction to take one before retiring. The prescription was put up by the clerk with minute care, being aided by another clerk, who checked the amount and weight of the morphine, according to a custom adopted where poisons are put up. The box, properly labelled, containing six capsules, each capsule containing one-sixth of a grain of morphine and four grains and a fraction of quinine, was taken by him. He never called for the sandal-wood capsules. The following day—being Wednesday, January 21st—he was at the school reception, and saw the deceased. The testimony in the case shows that the defendant stated to both coroner and deputy coroner, when shown and asked about the pill-box taken from the room of the deceased, that it was the one that he had given to her on Wednesday, January 21st, and he described the prescription as above, stating that he had given it to her for headaches, and that he had given her only four of the capsules. It was also shown by the testimony of several witnesses from the medical college that in the latter part of December and the first part of January lectures were given upon opium and its effects when used feloniously. The sulphate of morphine, contained in wide-mouthed bottles, had been passed around among the students, of whom the defendant was one, and they were allowed to take it out, and to handle it when they chose. After meeting the deceased at the reception on Wednesday, January 21st, the defendant left for Old Point Comfort, Va., and did not return until a week later. While there, it appears that she wrote to him that the medicine had not relieved her headache, and rather made her worse: to which he replied, advising her to continue taking it.

On Saturday, January 31st, deceased, her mother, and the defendant met at the school, and walked together. The deceased seemed perfectly well, and very bright and happy. Mother and daughter returned to the school, and, when in the bed-

room of the deceased, she showed her mother the pill-box, with one capsule left in it, and remarked she had been taking some capsules that Carl (the defendant) had brought her. She complained of their making her feel ill, and of her dislike to take them. She said she was tempted to toss it out of the window, and then to tell Miss Day, the principal, she had taken it. Her mother advised her to take it, remarking that quinine was apt to make one feel wretched, and that she might have been malarious. Her mother left, and then occurred the scenes of illness and death in that night which I have before described. The defendant was sent for towards daylight by Dr. Fowler, who, stating that he believed it to be a most profound case of opium poisoning, wished to learn what had been contained in the pill-box in her room, and which not only was the only evidence of anything like medicine about the room, but which, according to her room-mates, was the only medicine in the room that day. The defendant told him what had been its contents, and of his having prescribed the capsules for headache, insomnia, and the like. Dr. Fowler said one-sixth of a grain could not produce the condition, and advised him to go at once to the druggist, and to ascertain if the proportions of the drugs had been reversed. He pretended to go immediately, and, when he shortly after returned, stated to Dr. Fowler that the medicine had been prepared exactly according to his prescription. The evidence shows that he did not go to the druggist's that morning, as supposed by Dr. Fowler, nor until 11 o'clock, and after the death, when Dr. Kerr told him to go and try to get the original prescription if he could. During the time he was in the room where the deceased lay he surprised the physician by his composure and general lack of interest or of affection, except when, upon her death, he exclaimed, "My God, what will become of me!" He spoke to the physicians of being "somewhat interested in the girl," and mentioned a possible future engagement to her. He asked them repeatedly if they thought he could be held responsible for the death. To them and to the coroner he said he was merely a friend of the deceased, and pretended hesitation as to her correct given names. In the evening of the Sunday he met Mrs. Potts at the ferry-house, and stated to her that her daughter had died of morphine poisoning, and represented it "as the druggist's awful mistake." Mrs. Potts says, when she told him, as the deceased was the

mother of his child, she must be buried under his name, that his terror was frightful, and that he said that it could not be; that he would do anything, but that the knowledge of the marriage coming at this time would destroy him; that he would "answer just the same if it was Queen Victoria's daughter, 'She cannot be buried under my name;'" and he urged as a pretext consideration for the reputation of the school. The coroner met them at the school in the evening. The defendant said he had one of the capsules prescribed for the deceased, and gave it to the coroner, telling him to analyze it, and it would be found all right. Subsequent chemical analysis of it proved the correctness in preparing the prescription. The mother, in order, as she says, to get a permit to take the body, as soon as possible, out of the house, and to New Jersey, represented falsely, as she also admitted, that her daughter had heart trouble. She left the next day with the body. Some days later the defendant stated to Dr. Hayden, in conversation about the occurrence, and when rebuked for writing prescriptions, that "these capsules would not hurt any one, and no jury would convict me, because I have two capsules which can be analyzed, and be found to contain the correct dose." Of the druggist's clerk, witness Powers, at an interview at the store on February 7th, when obtaining some medicine, he asked if he had seen the account in the papers, and whether he believed it, and upon the witness expressing his belief that the girl died of heart disease, he said, "So do I." They talked about the putting up of the prescription, and the defendant said there was no doubt it was all right. To Dr. Peabody, whom he went to see with an introductory letter from his medical preceptor, a day or two after the death, and to whom he stated the circumstances attending it, he described the prescription and for what given, and alleged as an excuse for keeping out two of the capsules, that it was injudicious to put as much as a grain of morphine in a girls' school. Later in February, in a conversation with Dr. White, he said he did not know whether the druggist had made a mistake, or whether there was a brain tumor, which would account for the fact that the morphine in the capsule had been the cause of death. A few days before the coroner's inquest, which was held on February 27th, the defendant met Mrs. Potts, and said that the coroner's inquest would exonerate him, and that he was innocent; and upon her remarking, "If innocent, how did

she die?" he replied that "it was the druggist's mistake." She asked how that could be, when he said that the capsules, upon being analyzed, would prove it to be all right, and said the statements conflicted. He merely replied that he would have the capsules analyzed himself. He ascertained from her that neither Mr. Potts nor Dr. Treverton knew of her fears. He then endeavored to obtain from her the affidavit of the marriage, saying that he must have it, that it was more valuable than he dare tell her. She said he could not get it, "it is not here." The jury returned a verdict of "guilty," and, as was said by the learned judge, "a careful reading of the evidence, and a conscientious consideration of the facts disclosed, must inevitably lead to the formation of an opinion that the verdict of the jury was not only justified, but that no other conclusion could have been reached by the fairest mind."

DIVISION IV.

APPLICATION OF THE GENERAL PRINCIPLE TO PROOF OF THE CORPUS DELICTI IN CASES OF INFANTICIDE.

CHAPTER I.

PREGNANCY MUST BE ESTABLISHED.

OF the various forms of criminal homicide, that of infanticide, by which is popularly understood the murder of a recently born infant for the purpose of concealing its birth, perhaps presents the greatest difficulties in the establishment of the *corpus delicti*.

In addition to the sources of difficulty and fallacy which are incidental to charges of homicide in general, there are many circumstances of embarrassment peculiar to cases of this nature, amongst which may be mentioned the occasional uncertainty and inconclusiveness of the symptoms of pregnancy, the fundamental fact to be proved,¹ which may resemble and be mistaken for appearances caused by obstructions or spurious gravidity.² In a remarkable case of imputed murder of an adult female, the suspicion of pregnancy arose principally from the bulk of the deceased while living, coupled with circumstances of conduct which denoted the existence of an improper familiarity between the parties, and from the discovery upon *post-mortem* examination of what was believed by the witnesses for the prosecution to be the placental marks. Four medical witnesses expressed the strongest belief that the

¹ Hume's Comm. *ut supra*, 464.

² Rex v. Bate, Warwick Summer Assizes, 1809; Rex v. Ferguson, Burnett's C. L. *ut supra*, 574. Famous historical instances of this are the cases of Mary I. and Mary II. of England.

deceased had been recently delivered of a child nearly come to maturity; while on the other hand it was proved that she had been subject to obstructions; and it was deposed that the appearances of the uterus might be accounted for by hydatids, a species of dropsy in that part of the body, and that what was thought to be the placental mark might be the *pediculi* by which they were attached to the internal surface of the womb.¹ The learned judge said to the jury, that it was a very unfortunate thing, that upon every particular point they had to rest upon conjecture; that it was a conjecture to a certain extent that the deceased was with child, that it was conjecture to a certain degree that any means were used to procure abortion; and, if they were used, that it was conjecture that the prisoner was privy to the administration of them.

¹ *Rex v. Angus*, Lancaster Autumn Assizes, 1808, coram Mr. Justice CHAMBERE, Short-hand Report. And see Burnett's C. L. of Scotland, 575.

CHAPTER II.

THE BIRTH OF A LIVING CHILD MUST BE SHOWN.

It must be clearly shown that a child has been born alive, and acquired an independent circulation and existence;¹ it is not enough that it has breathed in the course of its birth;² but if a child has been wholly born, and is alive, and has acquired an independent circulation, it is not material that it is still connected with its mother by the umbilical cord,³ nor is it essential that it should have breathed at the time it was killed, as many children are born alive and yet do not breathe for some time after birth.⁴ But the language used by the courts in one or two late cases indicates, perhaps, a leaning towards somewhat different views. In a recent English case Brett, J., said: "The question to be answered is this: Did the child exist as a live child, breathing, and living by reason of breathing, through its own lungs alone, without deriving any of its living or power of living by, or through, any connection with its mother?"⁵

"A child which has been born but has not breathed," said the court in an important case in Iowa,⁶ "and is connected with the mother by the umbilical cord, may have the power to establish a new life upon its own resources antecedent to its exercise. While, after a child is born, it can no longer be called a *fetus* in the ordinary meaning of that word, yet it must be evident that when a child is born alive, but has not

¹ Harris v. State, 28 Tex. Crim. App. 308; 19 Am. St. R. 837.

² Rex v. Poolton, 5 C. & P. 399; Rex v. Enoch, Id. 589; Rex v. Crutchley, 7 Id. 814; Rex v. Sellis, Id. 856.

³ Reg. v. Reeves, 9 Id. 25; Reg. v. Wright, Id. 754; Reg. v. Trilloe, 1 C. & M. 650.

⁴ Rex v. Brain, 6 C. & P. 850.

⁵ Reg. v. Handley, 13 Cox C. C. 79. See also Johnson v. State (Tex. Crim. App.), 24 S. W. 285.

⁶ Winthrop v. State, 48 Ia. 519.

yet respired, its condition is precisely like that of the *fœtus in utero*. It lives merely because the *fœtal* circulation is still going on. In this case none of the organs undergo any change."¹

Whether a child has been born alive or not is a question for the jury to consider, and is frequently a question of considerable difficulty. The act of breathing is held to constitute incontrovertible evidence of the individual existence of the infant, and therefore the accomplishment of its independent circulation.² Now, though independent circulation in its proper sense follows breathing, yet the condition of the lungs can never determine whether the child breathed before or after full and complete birth. By the hydrostatic test it may be determined only whether the child has breathed. This test, from the indications of which, in former times, so many women suffered the extreme penalty of the law, though the best test known to medical science, is not infallible. The manner has been pointed out in which it can be determined whether the child breathed before or after emerging from the mother. Should an effort to respire take place while the head is still within the pelvis, mucus and not air would be drawn into the air-cells; and upon a *post-mortem* examination the lungs would disclose the exact nature of such a case. If, however, a skilled accoucheur, in a case of difficult and continued labor, were to insert his hand for the purpose of rendering assistance to the child thus endangered by protracted labor, and the child were to respire by means of the aid thus rendered, the *post-mortem* examination would not yield any evidence as to whether the respiration took place before or after birth. But as the mother can never perform this operation upon herself, this obstacle in the way of the test above stated will not present itself in a case of infanticide. So that in a case of this kind, if the lungs show atmospheric air and not mucus, it is to be concluded that the breathing occurred either after complete birth or after the head was expelled. The respiration test can never determine whether the child breathed after the expulsion of the head or after full and complete

¹ Beak, Med. Jur. vol. 1, p. 498.

² See Marshall's Outlines of Physiology (Ed. 1868), 980; Flint's Physiology of Man (1874), vol. 5, 442; Gray's Anatomy (5th Ed.), 768; Playfair's System of Midwifery (2d Ed.), by Harris, 120.

birth. Notwithstanding all this, it is necessary that the child should have been completely expelled from the body of the mother and alive ; and the proof must show this fact.¹

On the trial of a woman at Winchester Spring Assizes, 1835, it was proved that the lungs were inflated, which the medical witness said would not have been the case if the child had been still-born ; but he stated, in answer to a question from Mr. Baron Gurney, that if the child had died in the birth, the lungs might have been inflated, upon which he stopped the case.² A single sob, it appears, is sufficient to inflate the lungs, though the child died in the act of birth.³ A young woman was tried before Mr. Baron Parke for the murder of her female child ; the throat was cut, and the wound had divided the right jugular vein ; the lungs floated in water, and were found on cutting them to be inflated ; but it was deposed that this test only showed that the child must have breathed, and not that it had been born alive, and that there are instances of children being lacerated in the throat in the act of delivery. On the close of the case for the prosecution, the learned judge asked the jury whether they were satisfied that the child was born alive, and that the wound was inflicted by the prisoner with the intention of destroying life ; as, if they entertained any doubt on these points, it would be unnecessary to go into the evidence on behalf of the prisoner. The jury returned a verdict of acquittal.⁴ A negress was recently tried in Texas for the murder of her illegitimate child by strangulation. The body of a healthy, full-termed child, with a good growth of hair and well-formed nails, was found, with a string wound twice around the neck and tied in a knot on the back of the neck. A medical witness for the prosecution was certain that the child was born alive, because its eyes were partly open, whereas still-born children have the eyes closed. Pieces of the lungs floated in water ; and those organs were red, whereas they would have been of a dark color if the child had never respired. For the defence a physician testified that one child out of about every fifteen illegitimate births dies, though in other cases the fatality is not so great. It was also shown

¹ See the opinion of HURT, J., in *Wallace v. State*, 10 Tex. Crim. App. 255.

² *Rex v. Simpson*, Cummin on the Proof of Infanticide, 40.

³ *Rex v. Davidson*, 1 Hume's Comm. *ut supra*, 486.

⁴ *Rex v. Grounall*, Worcester Spring Assizes, 1837.

that, ordinarily, during delivery, the face of the child is usually towards its mother's back. This might account for the string being tied on the back of the child's neck. And negroes having less pain in delivery than white women, it might have been possible for the mother of this child to have tied the string around its neck before it was completely born.¹ The defendant was convicted, but on appeal the judgment was reversed. It seems that an evacuation of the bowels after the birth of the child cannot be depended on as an indication of life, for the evacuation might be caused by moving the dead body.²

Where the prisoner was charged with the murder of her own infant child, committed soon after birth, evidence was introduced for the State tending to show that the prisoner gave birth to the child in a barn, and buried it head downward in a small hole in the ground, covering the body with hay and straw. There were no marks of violence upon its person. The State was allowed to show by the testimony of an expert that to produce death it did not require the employment of force sufficient to leave marks on the body, but that there were various ways by which the mother could have killed it, as by suffocation, burying it in the manner in which it was found, and other ways.³

¹ *Wallace v. State, supra.*

² *Sheppard v. State*, 17 Tex. Crim. App. 74.
State v. Morgan, 95 N. C. 641.

CHAPTER III.

THE NATURE OF THE MOTIVE.

It is a further source of uncertainty, in cases of this nature, that circumstances of presumption, frequently adduced as indicative of the crime of murder, may commonly be accounted for by the agency of less malignant motives. Concealment of pregnancy and delivery may proceed even from meritorious motives; as where a married woman resorted to such concealment in order to screen her husband, who was a deserter, from discovery.¹ Severe must be the struggle between the opposing motives of shame and affection, before a mother can contemplate, and still more so before she can form and execute, the dreadful and unnatural resolution of taking away the life of her own offspring. The unhappy object of these conflicting motives is commonly the victim of brutality and treachery. Deserted by a heartless seducer, and scorned by a merciless world, scarcely any condition of human weakness can be imagined more calculated to excite the compassion of the considerate and humane.² In England the wisdom and humanity of the legislature, in accordance with the spirit of the times, led, though tardily, to the repeal³ of the cruel rule of presumption created by Statute 21 Jac. I. c. 27, and suggested by a corresponding edict of Henry II., of France, which made the concealment of the birth of an illegitimate child by its mother conclusive evidence of murder, unless she made proof by one witness at least that the child was born dead; a rule which had too long survived the barbarous age in which it originated, and under which it is but too probable that many women unjustly suffered;⁴ and the endeavor to conceal the birth of a child by secret burying, or otherwise disposing of the body,

¹ *Rex v. Stewart*, Burnett's C. L. *ut supra*, 572.

² 1 Hume's Comm. 462.

³ 1 Hume's Comm. 486.

⁴ St. 43 Geo. III. c. 58, § 8.

instead of being treated as a conclusive presumption of murder, was made a substantive misdemeanor.¹

And the difficulty in determining the question whether or not the child was born alive led to the passage, by some of the States of this Union, of statutes inflicting punishment on the mother who endeavors to conceal the birth of her infant.²

The casualties which, even in favorable circumstances, are inseparable from parturition, must be incalculably aggravated by the perplexities incidental to illegitimate, clandestine, and unassisted birth, from the impulses of shame and alarm, the desire of concealment, the want of assistance and sympathy, and occasionally from the mother's inability to render the attentions requisite to preserve infant life; and there have been cases in which even the very means resorted to, under the terror of the moment, to facilitate birth, have been the unintentional cause of death. For these reasons, wounds and other marks of violence are not necessarily considered as indicative of wilful injury, and are not, therefore, sufficient to warrant a conviction of murder, unless the concomitant circumstances clearly manifest that they were knowingly inflicted upon a body born alive. Nor are these principles of construction peculiar to our own law; it is believed that they prevail generally, if not universally, in the application of the criminal law to cases of this nature.³

It follows from these considerations, that though the facts may justify extreme suspicion that death has been the result of intentional violence, yet if they do not entirely exclude every other possible hypothesis by which it may be reasonably accounted for, the soundest principles of justice, and a proper regard to the fallibility of human judgment in cases so mysterious as these generally are, combine to forbid the adoption of a conclusion so abhorrent to nature and humanity, and the infliction of a punishment which admits of no recall.

It has been thought that in these cases the feelings of humanity have been permitted to bias the strict course of judicial truth, and that countenance has been given to subtle and strained hypotheses for the explanation of circumstances of conclusive presumption.⁴ It is to be feared that to some

¹ St. 9 Geo. IV. c. 31, § 14.

² *Frey v. Com.* (Ky.), 7 Crim. L. Mag. 72.

³ Alison's Princ. 159.

⁴ Whately on Secondary Punishments, 106.

extent this opinion is correct, and if so, it is a conclusive proof that the law is not in harmony with public feeling; but it may be doubted whether in this reproach sufficient weight has always been given to the difficulties inseparably incidental to the proof of this crime, and whether, in fact, acquittals take place so frequently as has been supposed, where it has been so clearly and satisfactorily proved as entirely to dispel all doubt, and to produce complete and undoubting assurance. It is, however, well deserving of consideration, whether the ends of public justice and social protection might not be better promoted by the abolition of capital punishment in a class of cases in which society will not concur in its infliction, and by the substitution of a minor punishment, not only in the case of concealment of birth, but generally in all cases where death has been caused by the wilful omission of the mother to take the necessary means for the preservation of infant life,¹ so as to avoid on the one hand the scandal and ill-example of acquittals in the face of convincing evidence of guilt, and on the other, of doing violence to public feeling by the denunciation of capital punishment against a crime which, atrocious as it is, is nevertheless wanting, as an eminent prelate has remarked, "in all the attributes which distinguish the murder of adults, viz., the wickedness of the motive, the danger of the community, and the feeling of alarm and insecurity which it occasions."²

¹ Code Penal d'Autriche, prem. partie, c. xvi. art. 122.

² Whately on Secondary Punishments, p. 108, App. No. 2. And see Selections from the Charges, etc., of Mr. Baron Alderson, 78.

PART VI.

THE FORCE AND EFFECT OF CIRCUMSTANTIAL EVIDENCE.

CHAPTER I.

GENERAL GROUNDS OF THE FORCE OF CIRCUMSTANTIAL EVIDENCE.

IN considering the force and effect of circumstantial evidence, the credibility of the *testimony*, as distinguished from the credibility of the *fact*, is assumed, since it is a quality essential to the value of circumstantial, in common with all moral, evidence.

Our faith in moral evidence is grounded, as we have seen, upon our confidence in the permanence of the order of nature, and in the reality and fidelity of the impressions received by means of the senses, which place us in connection with the external world and with other other men; and upon the laws of our moral and intellectual being, the immutability of moral distinctions, and the authority of conscience; so that if we could correctly estimate, and were able to eliminate, the various disturbing influences which tend to divert men from the path of truth and rectitude, our reasonings and conclusions would possess all the force of demonstration.

The silent workings, and still more the fearful explosions, of human passion, which bring to light the darker elements of man's nature, must ever present to the philosophical observer considerations of deep intrinsic interest; while to the jurist, the moral and mechanical coincidences which connect different facts with each other are relevant and all-important, as they are the intermediate connecting links between criminal actions

and the malignant feelings and dispositions in which they originate.

The distinct and specific proving power of circumstantial evidence, as incidentally stated in a former part of this volume, depends upon its incompatibility with, and incapability of explanation upon, any reasonable hypothesis, consistent with the ordinary course of nature, other than that of the truth of the principal fact in proof of which it is adduced : so that, after the exhaustion of every other possible and admissible mode of solution, we must either conclude that the accused has been guilty of the fact imputed, or renounce as illusory and deceptive all the results of consciousness and experience, and all the operations of the human mind.¹

Conclusions thus formed are simple inferences of the understanding, aided and corrected by the application of those rules of evidence and those processes of reason which sound and well-ripened experience has consecrated as the best methods of arriving at truth ; and they constitute that MORAL CERTAINTY upon which men securely act in all other great and important concerns, and upon which they may, therefore, safely rely for the truth and correctness of their conclusions in regard to those events which fall within the province of criminal jurisprudence.

Many Continental codes, following the principles of the civil law, prescribes imperative *formulae* descriptive of the kind and amount of evidence requisite to constitute legal proof. Those principles have prevailed also to a certain extent in the reception of evidence in the ecclesiastical and some other courts of special jurisdiction in England, so far as to require the testimony of a plurality of witnesses. But the diversities of individual men render it impracticable thus definitely to estimate the fleeting shades and infinite combinations of human motives and actions ; or thus to fix, with arithmetical exactness, a common standard of proof, which shall influence with unvarying intensity and effect the minds of all men alike. Such restrictive rules are not merely harmless, nor simply superfluous ; they are in some cases positively pernicious and dangerous to the cause of truth ; and while they operate as snares for the conscience of the judge, obliging him occasionally to determine contrary to his own convictions of truth, they are unnecessary for the protection of the innocent, and effective

¹ Mittermaier, *ut supra*, c. 59.

only for the impunity of the guilty.¹ A learned judge of one of the English ecclesiastical courts, after commenting on the rule of those courts, that one witness is not sufficient to establish the fact of adultery, said: "To this authority I readily submit, and I am bound to do so; but I must honestly say that I do it upon compulsion. I am bound by this rule, and so long as it remains a rule of these courts, so long as more evidence is required to prove an act of adultery than to find a man guilty of murder, it will be my duty to obey that rule."²

The very few cases in which our law requires a particular amount of evidence, as on trials for high treason, where two witnesses are required, and in cases of perjury, where there must be two witnesses, or the testimony of one witness confirmed by some independent corroborative evidence, are obviously grounded upon different principles; in the former, upon motives of policy and justice, for the protection of persons charged with political crime from becoming the victims of party violence; and in the latter, because the mere contradiction by the oath of a single witness is obviously not of itself sufficient to prove that the person accused has been guilty of wilful falsehood.³

By the Texas Code of Criminal Procedure⁴ a conviction for perjury cannot be had upon purely circumstantial evidence which is not virtually direct and positive. Such conviction can be had only upon confession in open court, or upon the direct, positive testimony of two witnesses, or of one witness corroborated strongly by other evidence, establishing the falsity of the statement assigned as perjury.⁵

Under this rule, if it is proved that the witness who swore to the commission of a certain act, and that he was an eye-witness thereof, was in a distant part of the country at the time of the commission of the act, this, though technically circumstantial, is said to be virtually positive evidence establishing the falsity of the statement, and authorizes conviction.⁶

It may be permitted in this place to advert briefly to the law concerning the corroboration of the testimony of an accom-

¹ Mittermaier, *ut supra*, c. 8.

² Per Dr. Lushington, in *Taylor v. Taylor*, 6 Eccl. & Mar. Cases, 563.

³ See also 7 & 8 Vict. c. 101, § 3, and 8 & 9 Vict. c. 10, § 6, as to confirmatory evidence in orders of affiliation.

⁴ Art. 746.

⁵ *Kemp v. State*, 28 Tex. Crim. App. 519.

⁶ *Mains v. State*, 26 Tex. Crim. App. 14.

plice. In England, it has repeatedly been laid down that the jury may act on the testimony of an accomplice without confirmatory evidence.¹ But it has been the almost uniform practice of the judges to advise juries not to convict upon the evidence of an accomplice who is uncorroborated. And this practice has been said to be one "deserving of all the reverence of law."² Thus we find that in England the law on this subject is in an anomalous condition. "As the law now stands," says an authority for whom we have the highest respect, "it is universally agreed by all the authorities that, if the accomplice were uncorroborated, a judge would be wrong who did not advise the jury not to convict; whereas, the court of criminal appeal would be bound to pronounce an opinion that a judge who did not so advise them was right."³

In this country, in those States where the rule has not been altered by statute, it is well settled that a jury may convict upon the uncorroborated testimony of an accomplice; but it is the usual practice to advise a jury to acquit where the testimony of the accomplice is uncorroborated.⁴

It is the established rule in Michigan that it is the province of the jury to determine whether an accomplice is to be credited, and if so, to what extent.⁵ A learned justice of the Supreme Court of Illinois has well stated the reasons for this rule, thus: "The tendency with us is to arbitrarily exclude as little as possible, but to listen and give credence to whatever tends to establish the truth. The innocent should not be convicted, nor should the guilty escape punishment, by reason of any merely arbitrary rule preventing the free and full exercise of the judgment as to the truthfulness or untruthfulness of testimony, and the reliance to be placed upon it in the trial of cases. In many, probably in most, cases, the evidence of an

¹ *Rex v. Hastings*, 7 C. & P. 152; *Rex v. Attwood*, 1 Leach, 464; *Rex v. Durham*, Id. 478. And see remarks of Lord ELLENBOROUGH, in *Rex v. Jones*, 2 Campbell, 132; of ALDERSON, B., in *Rex v. Wilks*, 7 C. & P. 273; of GURNEY, J., in *R. v. Jarvis*, 2 Moo. & R. 40. See also *Reg. v. Stubbs*, 7 Cox C. C. 48.

² Lord ABINGER, C. B., in *Reg. v. Farler*, 8 C. & P. 106.

³ *Roscoe's Cr. Ev.* (8th Am. Ed.) 202.

⁴ *Com. v. Scott*, 128 Mass. 222; *Earl v. People*, 73 Ill. 328; *Wisdom v. People* (Col.), 17 Pac. 519; *Ingalls v. State*, 48 Wis. 647; *Dick v. State*, 30 Miss. 593; *State v. Stebbins*, 29 Conn. 463; *State v. Betsall*, 11 W. Va. 708.

⁵ *People v. Hare*, 57 Mich. 505.

accomplice, uncorroborated in material matters, will not satisfy the honest judgment beyond a reasonable doubt, and then it is clearly insufficient to authorize a verdict of guilty. But there may frequently occur other cases where, from all the circumstances, the honest judgment will be as thoroughly satisfied from the evidence of the accomplice, of the guilt of the defendant, as it is possible it could be satisfied from human testimony, and in such a case it would be an outrage upon the administration of justice to acquit.”¹

In several States, however, under the statute, a conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime.² This is the law in Arizona,³ Iowa,⁴ New York,⁵ Oregon,⁶ and Texas.⁷ And under the statute this rule is positive and peremptory.⁸

The dangers of accomplice testimony, which led to the passage of these statutes, have been thus enlarged upon by a learned judge of that celebrated criminal court, the Texas Court of Appeals: “The statements of the witness are usually plausible, connected, and apparently sincere. Usually his own life or liberty is at stake, and depending on the conviction of his alleged confederate, and his confessed infamy is not likely to deter him from making any statement he may deem essential to his own preservation. He fixes guilt with almost absolute precision; and the circumstantial details he gives in evidence, added to his apparent or real desire to reveal all the facts attendant upon and constituting the crime, are calculated to easily impose upon a jury and to cause them to place entire confidence in the truth of his evidence. They are likely to forget his infamy, and in an honest and laudable desire to punish the outrage upon law, they adopt his evidence as a proper basis for their verdict, without much regard as to whether it is corroborated or not.”⁹ Nevertheless, it is certainly true that, where this rule is in force, it may often happen, as has been said, that a jury is required,

¹ Remarks of Mr. Justice SCHOFIELD, in *Collins v. People*, 98 Ill. 584.

² Ore. Cr. Code, § 172.

³ Terr. v. Neligh, 10 Pac. 367.

⁴ *State v. Thornton*, 26 Ia. 80.

⁵ N. Y. Code of Crim. Proc. § 399.

⁶ Note 2, *supra*.

⁷ Tex. Code of Crim. Proc. art. 741.

⁸ *Coleman v. State*, 44 Tex. 109. But the corroboration may be by circumstantial evidence. *State v. Miller* (Ia.), 65 Ia. 60; *State v. Stanley*, 48 Ia. 221.

⁹ Remarks of Judge CLARK in *Robertson v. State*, 9 Tex. Crim. App. 209.

under the law and the evidence, to return a verdict of acquittal when each member of the jury may reasonably believe that the defendant is not innocent.¹

If it be proved that a party charged with crime has been placed in circumstances which commonly operate as inducements to commit the act in question, that he has so far yielded to the operation of those inducements as to have manifested the disposition to commit the particular crime, that he has possessed the requisite means and opportunities of effecting the object of his wishes, that recently after the commission of the act he has become possessed of the fruits or other consequential advantages of the crime, if he be identified with the *corpus delicti* by any conclusive mechanical circumstances, as by the impressions of his footsteps, or the discovery of any article of his apparel or property at or near the scene of the crime, if there be relevant appearances of suspicion connected with his conduct, person, or dress, and such as he might reasonably be presumed to be able, if innocent, to account for, but which nevertheless he cannot or will not explain, if, being put upon his defence *recently* after the crime, under strong circumstances of adverse presumption, he cannot show where he was at the time of its commission, if he attempt to evade the force of those circumstances of presumption by false or incredible pretences, or by endeavors to evade or pervert the course of justice, the concurrence of all or of many of these cogent circumstances, inconsistent with the supposition of his innocence and unopposed by facts leading to a counter-presumption, naturally, reasonably, and satisfactorily establishes the moral certainty of his guilt, if not with the same kind of assurance as if he had been seen to commit the deed, at least with all the assurance which the nature of the case and the vast majority of human actions admit. To sum up, where all the circumstances of time, place, motive, means, opportunity, and conduct concur in pointing out the accused as the perpetrator of the crime, there must be a moral, if not absolute, certainty of his guilt. And where these circumstances concur the evidence is powerfully strengthened by the total absence of any trace or vestige of any other agent.² In such

¹ See the language of the court in *McMillan v. State*, 7 Tex. Crim. App. 142.

² *Stark. Ev.* (10th Am. Ed.) 851; *Dean v. Com.*, 32 Grat. 912; *Cheverins v. Com.*, 8 Crim. L. Mag. 760.

circumstances we are justly warranted in adopting, without qualification or reserve, the conclusions to which, "by a broad, general, and comprehensive view of the facts, and not relying upon minute circumstances with respect to which there may be some source of error,"¹ the mind is thus naturally and inevitably conducted, and in regarding the application of the sanctions of penal laws as a mere corollary.

Nor can any practice be more absurd and unjust, than that perpetuated in some modern codes, which, while they admit of proof by circumstantial evidence, inconsistently deny to it its logical and ordinary consequences. Thus the penal code of Austria² prohibits the application of capital punishment to the crime of murder, "où l'inculpé n'est convaincu que par le concours des circonstances;" but nevertheless the party may be sentenced to an imprisonment of twenty years; and the same indefensible practice prevails in many other States, though with a considerable diversity as to the maximum penalty.³ Some of the codes of our own States contain provisions which manifest the extreme difficulty of entirely casting aside this erroneous idea. Thus by the Georgia code it is provided that where the conviction in murder trials is founded solely on circumstantial evidence, the presiding judge may sentence to confinement in the penitentiary for life, instead of to death.⁴ How wise and just the emphatic condemnatory language of the French Papinian: "Ut veritas, ita probatio, scindi non potest: quæ non est plena veritas est plena falsitas, non semiveritas; sic, quæ non est plena probatio, plane nulla probatio est."⁵

¹ Per Lord C. B. POLLOCK in *Reg. v. Manning*, *supra*.

² *Première Partie*, art. 430.

³ *Mittermaier*, *supra*, c. 61.

⁴ § 4323. See *Regular v. State*, 58 Ga. 284.

⁵ *Cujas*, *Cod. t. de Leg.* And see *Gabriel*, *supra*, 67.

CHAPTER II.

CONSIDERATIONS WHICH AUGMENT THE FORCE OF CIRCUMSTANTIAL EVIDENCE IN PARTICULAR CASES.

SUCH are the considerations which constitute the force and effect of circumstantial evidence in *general* ; but there are some collateral considerations which augment the force of circumstantial evidence in *particular* cases, and greatly increase the strength and security of our convictions, upon which it will be expedient to dilate.

The principal of these auxiliary considerations arises from the concurrence of many or of several separate and independent circumstances pointing to the same conclusion, especially if they be deposed to by unconnected witnesses. In proportion to the number of cogent circumstances, each separately bearing a strict relation to the same inference, the stronger their united force becomes, and the more secure becomes our conviction of the moral certainty of the fact they are alleged to prove, as the intensity of light is increased by the concentration of a number of rays to a common focus. Circumstances altogether inconclusive, if separately considered, may, by their number and first operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof.¹ A single isolated fact or circumstance might be no evidence ; two or three more taken together might not make evidence in the eye of the law ; but a multitude of slight facts taken together as true might make evidence that would warrant a jury in finding a verdict of guilty in the most serious cases.² This is well illustrated by an early case in this country where the defendant was indicted for murder by stabbing with a dirk. A dirk without a cap had been found secreted near the place of the murder, and the

¹ Coggeshall v. U. S. ("The Slavers"), 2 Wallace, 383 ; Campbell v. State, 23 Ala. 44.

² State v. White, 89 N. C. 462.

cap of a dirk, engraved with the letters J. H., was handed to a witness, by a negro, a mile and a half from the place ; but how the negro came by it no one could tell. The handle was engraved with the letters J. H.; and it appeared that sixteen or seventeen years before a witness purchased a dirk, with this engraving, for the half-brother of the prisoner ; that the half-brother had since died, and the prisoner had admitted that a dirk was the only part of his brother's property he had received. The witness who heard him make this admission saw a dirk in his hands, with J. H. engraved on the handle, but could no farther identify it with the one produced. The dirk found secreted was, from its general appearance, identified as the one produced on the trial, and the cap produced by the negro apparently fitted the handle. The prisoner had, before the murder, lent a dirk, not identified in the trial, which was returned to him before the murder was committed. There was no proof that the prisoner had ever been at or near the place of the murder. These circumstances were all allowed to go to the jury as evidence from which they might find that the dirk belonged to the prisoner. A verdict of guilty was returned. It is manifest that any one of these circumstances, standing alone, was of very insignificant importance ; but the result of the trial made very clear the magnitude of their combined force.¹ It is forcibly remarked by a learned writer, that "the more numerous are the particular analogies, the greater is the force of the general analogy resulting from the fuller induction of facts, not only from the mere accession of particulars, but from the additional strength which each particular derives by being surveyed jointly with other particulars, as one among the correlative parts of a system."² Although neither the combined effect of the evidence, nor any of its constituent elements, admits of numerical computation, it is indubitable that the proving power increases with the number of the independent circumstances and witnesses, according to a geometrical progression. The effect of a body of circumstantial evidence is sometimes compared to that of a chain, but the metaphor is obviously inaccurate. Circumstantial evidence is not to be considered as a chain and each piece

¹ *Mendum v. Com.*, 6 Rand. 704. See report of this case and comments thereon in Cowen & Hill's notes to Phillips on Evidence (3d Ed.), vol. 4, p. 598.

² Hampden's Essay, *ut supra*, 68.

of evidence as a link in the chain, for then if any one link broke the chain would fall.¹ A chain cannot be stronger than its weakest link, and hence, where the fact of guilt depends upon proof of a series of links constituting a chain, the absence of a single link will be as fatal to a conviction as the absence of all the links. But the simile of a chain and links can only be applicable where there is a series of facts, one succeeding the other, and each connected with and dependent upon the other.² There is no rule of law which prescribes any definite number of circumstances as necessary to the sufficiency of circumstantial proof. There may be and there are cases where a single circumstance will justify the jury in finding the existence of an inferential fact. Unexplained possession of an article recently stolen is of this class, and from this single circumstance the inference is frequently drawn that the party thus found in possession is the thief. Circumstances, however, may be admitted in evidence which are much less determinate and satisfactory.³ "Ordinarily," said Chief Justice Greene,⁴ "in a case resting on circumstances, a linked arrangement of fact to fact is observable in a part or parts of the evidence. But a guilty person is more commonly hemmed in by a throng of circumstances than enclosed by facts arranged chain-wise. Release from a chain comes when the weakest link gives away; but escape from a crowd does not necessarily depend on the presence or absence of one or another, or even perhaps the greatest number, of the individuals composing it."

Commenting on an instruction to the effect that it was not necessary that the jury should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt, Helm, J., of the Supreme Court of Colorado, said: "The metaphor used is inaccurate and liable to misconstruction. . . . This figure of speech may perhaps be correctly applied to the ultimate and essential facts necessary to conviction in criminal cases, since if one be omitted, or be not proven beyond a reasonable doubt, an acquittal must follow. It is not true, however, that each and every of the minor circumstances introduced to sustain these ultimate facts must be proven with the same degree of certainty. Some of

¹ POLLOCK, C. B., in *Reg. v. Exall*, 4 F. & F. 922.

² *Bressler v. People*, 117 Ill. 422.

³ *Tompkins v. State*, 82 Ala. 569.

⁴ In *Leonard v. Terr.*, 2 Wash. Terr. 381; 7 Pac. 872.

these circumstances may fail of proof altogether, and be discarded from consideration by the jury, yet the ultimate fact to establish which they were presented may be shown beyond a reasonable doubt. Evidence in similar cases has been most aptly likened to a cable. One, two, or half a dozen strands may part, yet the cable still remain so strong that there is scarcely a possibility of its breaking."¹

Again, an attempt has been made to convey an idea of the force of this kind of evidence by instituting a comparison between it and a bundle of rods, from which, one by one, each stick may be taken away and easily broken, though the united fagot will resist the strength that would destroy it.²

These remarks are applicable with especial force to the written enumeration of a number of minute facts "multiplying beyond calculation the means of detecting imposture, serving the purpose of an accuser by limits and allusions only, such as would be found in genuine correspondence, not by those clear and positive manifestations of guilt by which an eager partisan betrays his forgeries."³

"In estimating the force of a number of circumstances tending to the proof of the disputed fact," says Starkie, "it is of essential importance to consider whether they be dependent or independent. If the facts A, B, C, D, be so essential to the particular inferences to be derived from them, when established, that the failure in the proof of any one would destroy the inference altogether, they are dependent facts. If, on the other hand, notwithstanding the failure in proof of one or more of those facts, the rest would still afford the same inference or probability as to the contested fact which they did before, they would be properly termed independent facts. The force of a particular inference drawn from a number of dependent facts is not augmented, neither is it diminished, in respect of the number of such independent facts provided they be established. But the probability that the inference itself rests upon sure grounds is, in general, weakened by the multiplication of the number of circumstances essential to the proof; for the greater

¹ *Clare v. People*, 9 Col. 122. See also remarks of POLLOCK, C. B., in *Reg. v. Exall*, 4 F. & F. 922; *Marion v. State*, 16 Neb. 349; *Graves v. People*, 18 Colo. 170; *Wharton v. State*, 73 Ala. 366; *Grant v. State*, 11 So. 915; *People v. Kerr*, 6 N. Y. Cr. R. 406.

² *Carroll v. Com.*, 84 Pa. St. 107. See also *Dean v. Com.*, 32 Grat. 912.

³ *Mack. Hist. ut supra*.

the number of circumstances essential to the proof is, the greater latitude is there for mistake or deception ; on the other hand, where each of a number of independent circumstances, or combinations of circumstances, tends to the same conclusion, the probability of the truth of the fact is necessarily greatly increased in proportion to the number of these independent circumstances.”¹

The increase of force produced by the concurrence of independent *circumstances* is analogous to that which is the result of the concurrence of several independent *witnesses* in relating the same fact ; and if these elements admitted of numerical evaluation, their combined effect would be capable of being represented by a fraction, having for its numerator the product of the chances favorable to the testimony of each witness, and for its denominator, the sum of all the chances, favorable and unfavorable, the unfavorable chances being the product of the several deficiencies of the witnesses. But if in such case the witnesses be dependent on each other, so that the testimony of the second depends for its truth upon the first, that of the third upon the second, and so on, then the effect of the evidence diminishes with every increase in the number of the witnesses or the facts, just as an increase in the denominator of a fraction reduces it to one of inferior value.²

The learned writer from whom we have already quoted in this connection has illustrated the subject by a case which at first sight seems an extreme one, and it has occasionally been pressed in argument with much force.³ “Let it be supposed,” says he, “that A. is robbed, and that the contents of his purse were one penny, two sixpences, three shillings, four half-crowns, five crowns, six half-sovereigns, and seven sovereigns, and that a person apprehended in the same fair or market where the robbery takes place is found in possession of the same remarkable combination of coin, and of no other, but

¹ Stark. Ev. (10th Am. Ed.) 851.

² 2 Kirwan's Logic, c. vii ; Hartley's Obs. c. iii. § 2, prop. lxxx.

“According to the principles of pure abstract mathematical reasoning,” there would be no increase of probability in favor of the fact. Stark. on Ev. (10th Am. Ed.) * p. 853.

³ Trial of the Rev. Ephraim Every, charged with the murder of Sarah Maria Cornell, before the Supreme Court of Rhode Island, May, 1833. (Boston.)

that no part of the coin can be identified; and that no circumstances operate against the prisoner except his possession of the same combination of coin; here, notwithstanding the very extraordinary coincidence as to the number of each individual kind of coin, although the circumstances raise a high probability of identity, yet it still is one of a definite and inconclusive nature."¹ The probability that the coins lost and those discovered are the same is so great, that perhaps the first impulse of every person unaccustomed to this kind of reasoning is unhesitatingly to conclude that they certainly are so; yet, nevertheless, the case is one of probability only, the degree of which is capable of exact calculation; but if that degree of probability, high as it is, were sufficient to warrant conviction in the particular case, it would be impossible to draw the distinction between the degree of probability which would and that which would not justify the infliction of penal retribution in other cases of inferior probability. In the case of a small number of coins, two or three, for instance, the probability of their identity would be very weak; and yet the two cases, though different in degree, are in principle the same; and the chance of identity is in both cases equally capable of precise determination. The learned writer adds, that "although the fact taken nakedly and alone, without any collateral evidence, would in principle be inconclusive, yet, if coupled with circumstances of a conclusive tendency, such as flight, concealment of the money, false and fabricated statements as to the possession, it might afford strong and pregnant evidence of guilt for the consideration of the jury." In like manner it would be difficult to resist the inference of the identity of the coins, if in the case supposed they were scarce or foreign ones.

From the number of qualifying considerations connected with facts which are the subjects of testimonial evidence, and the impracticability of forming a numerical estimate of such facts, or of the veracity of witnesses, the cases to which this kind of reasoning is applicable, if there be any such, must be very rare. Every combination of moral incidents and contingent probabilities must give a product of the same nature, and affected by the same sources of error and uncertainty, as affect

¹ Stark. Ev. (10th Am. Ed.) 854, n.

its separate elements; and in all judgments grounded upon circumstantial evidence, this fundamental difference between moral and mathematical certainty must be borne in mind. "It were absurd," declares an eminent philosopher, "to say that the sentiment of belief produced by any probability is proportioned to the fraction which expresses that probability; but it is so related to it, or ought to be so, as to increase when it increases, and to diminish when it diminishes."¹ It is manifest, however, that the consequence of the concurrence of a plurality of witnesses, and the conjunction of separate circumstances, is to add immensely to the force of each; and if the credit of the witnesses be unimpeachable, and the hypotheses of confederacy and error be excluded, then no other conclusion can be rationally adopted, than that the facts to which they depose are true. The case suggested is that of circumstantial evidence in its most cogent form; and in such case, the conclusion to which its various elements converge must be regarded as morally irresistible.

Independently of the direct effect of that probability which results from a concurrence of independent witnesses or circumstances, the security of our judgments is further increased from the considerations, that in proportion to the number of such witnesses or circumstances, confederacy is rendered more difficult, and that increased opportunities and facilities are afforded of contradicting some or all of the alleged facts if they be not true. To preserve consistency in a work even professedly of fiction, where all the writer's art and attention are perpetually exerted to avoid the smallest appearance of discrepancy, is an undertaking of no common difficulty; and it is obvious that the difficulty must be incomparably greater of preserving coherency and order in a fabricated case which must be supported by the confederacy of several persons, where, since by the hypothesis the congruity results from artifice, the slightest variation in any of the minute circumstances of the transaction or of its concomitants may lead to detection and exposure. On the other hand, though if the main features of the case do not satisfactorily establish guilt, it is not safe to rely upon very minute circumstances,² yet, if the statements of the witnesses are based upon realities, the more rigorously they are sifted

¹ 4 Playfair's Works, 437.

² Per Mr. Baron ROLFE, in Reg. v. Rush, Norfolk Sp. Ass., 1849.

the more satisfactory will be the general result, from the development of minute, indirect, and unexpected coincidences in the attendant minor particulars of the main event. It was happily remarked by Dr. Paley, that "the *undesignedness* of the agreements (which undesignedness is gathered from their latency, their minuteness, their obliquity, the suitableness of the circumstances in which they consist to the places in which those circumstances occur, and the circuitous references by which they are traced out) demonstrates that they have not been produced by meditation or by any fraudulent contrivance. But coincidences from which these causes are excluded, and which are too numerous and close to be accounted for by accidental concurrences of fiction, must necessarily have truth for their foundation."¹ The same learned writer also justly remarks, that "no advertency is sufficient to guard against slips and contradictions when circumstances are multiplied."² Hence it is observed in courts of justice, that witnesses who come to tell a concerted story are always reluctant to enter into particulars, and perpetually resort to shifts and evasions to gain time for deliberation and arrangement, before they reply directly to a course of examination likely to bring discredit upon their testimony.

It must, nevertheless, be admitted that history and experience supply abundant evidence that it would be most erroneous in the abstract to decide a matter of fact by numbers, and that there have been extraordinary cases of false charges, most artfully and plausibly supported by connected trains of feigned circumstances.

But considering the circumstances of the class of persons most frequently subjected to accusation for alleged crime, deprived of personal freedom, often friendless, and still more frequently destitute of pecuniary resources and professional aid, their imperfect means of knowing all the facts proposed to be proved, or the manner in which they are attempted to be connected, the alleged facility of disproof is often more imaginary than real. Lord Eldon thus forcibly expressed himself on this question: "I have frequently thought that more effect has been given, than ought to have been given, in what

¹ Paley's Evid. p. ii. c. vii. ; Whately's Rhet. p. i. c. ii. s. 4 ; Greenleaf's Ex. *ut supra*, 89.

² Horæ Paulinæ, c. i.

is called the summing-up of a judge on a trial, to the fact, that there has not been the contradiction on the part of the defence which it is supposed the witnesses for the accusation might have received. . . . It may often happen that, in the course of a trial, circumstances are proved which have no bearing on the real question at issue; and it may also happen that facts are alleged and sworn to by witnesses, which it is impossible for the accused party to contradict; circumstances may be stated by witnesses which are untrue; yet they may not be contradicted, because the party injured by them, not expecting that that which never had any existence would be attempted to be proved, cannot be prepared with opposing witnesses. So also, in cases in which an individual witness speaks to occurrences at which no other person was present but himself, there it may be absolutely impossible to contradict him.”¹

Many of the disadvantages under which prisoners on trial are necessarily placed have been removed or diminished in England by the provisions of various statutes² which give to persons held to bail or committed to prison *a right* to require copies of the examination of the witnesses upon whose evidence they have been held to bail or committed, on payment of a moderate charge, and at the time of trial to inspect the depositions returned into court.³ The argument founded on the means afforded of disproof may consequently now be urged with more justice and effect than formerly, though still a party charged with crime has not of right any means of knowing any facts which may have been discovered in the interval before trial,⁴ or where an indictment is found without previous

¹ 3 Hansard's Parl. Deb., 2d ser., 1445.

² See 6 & 7 Will. IV. c. 114, §§ 3 & 4; 11 & 12 Vict. c. 42, § 27; 22 & 23 Vict. c. 33, § 3; 30 & 31 Vict. c. 35, §§ 3 & 4.

³ None of these enactments appear to apply to the case of commitment by the coroner upon a verdict of murder. Of course, when the depositions are returned into the court before which the trial is to be had, the court has power by its general jurisdiction to order copies to be given. Nor does the statute apply to the case of prisoners committed for re-examination, but only to those who have been fully committed for trial. *Reg. v. Lord Mayor of London*, 5 Q. B. 555; 13 L. J. M. C. 67. So when a prisoner had been committed to jail till he should give sufficient sureties for keeping the peace and for appearing at the Sessions to do as the court should order, it was held on a rule for mandamus to justices to furnish copies of the depositions taken against him that he was not entitled to them. *Ex parte Humphreys*, 19 L. J. M. C. 189.

⁴ *Rex v. Greenacre*, 8 C. & P. 32; *Reg. v. Walford*, Id. 767; *Reg. v. Connor*, 1 Cox C. C. 233.

commitment. But although it is a matter of comment to the jury, yet it is held in England to be no objection in point of law that the prisoner has had no intimation of the evidence to be given against him.¹

There are, moreover, many cases which do not afford the alleged facility of disproof in any degree; where, even admitting the truth of the testimony, the supposed presumption of guilt is nothing more than a mistaken conclusion from facts which afford no warrant for the inference of guilt; in such circumstances, to attempt disproof is to attempt to grapple with a shadow; to require it, to exact an impossibility.²

The preceding considerations imply the necessity of consistency and general harmony in the testimony of the different witnesses. All human events must necessarily form a coherent whole; and actual occurrences can never be mutually inconsistent.

If, therefore, the independency of the witnesses be proved, or rendered highly probable, to the same extent will the truth of their testimony be established.³ It was objected in an English case that two reporters, whose accounts were relied on,

¹ Reg. v. Greenslade, 11 Cox C. C. 412.

² Rex v. Looker, Rex v. Downing, and Rex v. Thornton, *supra*.

³ Stark. on Ev. (10th Am. Ed.) 829. "So far does this principle extend," continues the learned author, "that in many cases, except for the purpose of repelling the suspicion of fraud and concert, the credit of the witnesses themselves for honesty and veracity may become wholly immaterial. Where it is once established that the witnesses to a transaction are not acting in concert, then, although individually they should be unworthy of credit, yet if the coincidences in their testimony be too numerous to be attributed to mere accident, they cannot possibly be explained on any other supposition than that of the truth of their statement. . . . The nature of such coincidences is most important: are they natural ones which bear not the marks of artifice and premeditation? Do they occur in points obviously material or in minute and remote points which are not likely to be material, or in matters the importance of which could not have been foreseen? The number of such coincidences is also worthy of the most attentive consideration; human cunning, to a certain extent, can fabricate coincidences, even with regard to minute points, the more effectually to deceive; but the coincidences of art and invention are necessarily circumscribed and limited, whilst those of truth are indefinite and unlimited; the witnesses of art will be copious in their detail of circumstances, as far as their provision extends; beyond this they will be sparing and reserved, for fear of detection, and thus their testimony will not be even and consistent throughout; but the witnesses of truth will be equally ready and equally copious upon all points."

were of no authority; "but," said Lord Mansfield, "if both the reporters were the worst that ever reported, if substantially they report a case in the same way, it is demonstrative of the truth of what they report or they could not agree."¹

If one of two witnesses depose that he saw an individual at London, and the other that he saw him at York, at or near the same precise moment, the accounts are absolutely irreconcilable, and one or other of them must by design or by inadvertence be untrue. A diversity ought always to excite caution and a scrupulous regard to the capacity, situation, and disposition of the witnesses, and especially to the possibility of confusion from some mental emotion. "We are frequently mistaken," said Lord Chief Baron Pollock, "even as to what we may suppose we see; and still oftener are we mistaken as to that which we suppose we hear."² Lord Clarendon relates, that in the alarm created by the Fire of London, so terrified were men with their own apprehensions, that the inhabitants of a whole street ran in a great tumult one way, upon the rumor that the French were marching at the other end of it.³ The same noble historian has also given another anecdote relating to that great calamity, too instructive as applicable to this subject to be omitted. A servant of the Portuguese ambassador was seized by the populace and pulled about, and very ill-used, upon the accusation of a substantial citizen, who was ready to take his oath that he saw him put his hand in his pocket, and throw a fire-ball into a house, which immediately burst into flames. The foreigner, who could not speak English, heard these charges interpreted to him with amazement. Being asked what it was that he pulled out of his pocket, and what it was he threw into the house, he answered, that he did not think he had put his hand into his pocket, but that he remembered very well that as he walked in the street he saw a piece of bread upon the ground, which he took up and laid upon a shelf in the next house, according to the custom of his country; which, observes a learned writer,⁴ is so strong, that the King of Portugal himself would have acted with the same scrupulous regard to general economy. Upon searching the house, which was in view, the bread was found just within the

¹ *Rex v. Genge*, Comp. 16.

² *Reg. v. Manning and wife*, *supra*.

³ *Clarendon's Life and Continuation*, 91 (Oxford Ed. 1827).

⁴ *Woodeson's Lect. on the Laws of England*, Lect. 53.

door, upon a board as described; and the house on fire was two doors beyond it, the citizen having erroneously concluded it to be the same; "which," says Lord Clarendon, "was very natural in the fright that all men were in."¹

But *variations* in the relations by different persons of the same transaction or event, in respect of unimportant circumstances, are not necessarily to be regarded as indicative of fraud or falsehood, provided there be substantial agreement in other respects. True strength of mind consists in not allowing the judgment, when founded upon convincing evidence, to be disturbed because there are immaterial discrepancies which cannot be reconciled. When the vast inherent differences in individuals with respect to natural faculties and acquired habits of accurate observation, faithful recollection, and precise narration, and the important influence of intellectual and moral culture, are duly considered, it will not be thought surprising that entire agreement is seldom found amongst a number of witnesses as to all the collateral incidents of the same principal event. Lord Ellenborough said that the general accordance of all material circumstances rather confirmed by minute diversity than weakened the general credit of the whole, and gave it the advantage which belongs to an artless and unartificial tale; and that minute variances exclude the idea of any uniform contrivance and design in the variation, for where it is an artful and prepared story, the parties agree in the minutest facts as well as in the most important.² "I know not," says Paley, "a more rash or unphilosophical conduct of the understanding than to reject the substance of a story by reason of some diversity in the circumstances with which it is related. The usual character of human testimony is substantial truth under circumstantial variety. That is what the daily experience of courts of justice teaches. When accounts of a transaction come from the mouths of different witnesses, it is seldom that it is not possible to pick out apparent or real inconsistencies between them. These circumstances are studiously displayed by an adverse pleader, but oftentimes with little impression upon the minds of the judges. On the contrary, a close and minute agreement induces the suspicion of confederacy and fraud."³

¹ 3 Clarendon's Life and Continuation, *ut supra*, 86.

² Rex v. Lord Cochrane and others, Gurney's Rep. 456.

³ Paley's Evidences, p. iii. c. 1.

Instances of discrepancy as to the minor attendant circumstances of historical events are numberless. Lord Clarendon relates that the Marquis of Argyle was condemned to be *hanged*, and that the sentence was performed the *same day*. Burnet, Woodrow, and Echard, writers of good authority, who lived near the time, state that he was *beheaded*, though condemned to be hanged, and that the sentence was pronounced on Saturday and carried into effect on the Monday following.¹ Charles II., after his flight from Worcester, has been variously stated to have embarked at Briththelmstone and at New Shoreham.² Clarendon states that the royal standard was erected about six o'clock of the evening of the 25th of August, "a very stormy and tempestuous day;" whereas other contemporary historians variously state that it was erected on the 22d and the 24th of that month.³ By some historians the death of the Parliamentary leader Pym is stated to have taken place in the month of May, 1643;⁴ while by others it is said to have occurred in the following year. To come nearer to our own times, the author of a celebrated biographical memoir relates, that after the Rebellion of 1745 three lords were executed at Tower-hill; whereas it is well known that *two* only underwent that doom, the third, Lord Nithsdale, having, by the heroic self-devotion of his wife, effected his escape the night before his intended execution.⁵ It is remarkable that contemporary and early writers have stated the lady in question to have been his mother. Such discrepancies never excite a serious doubt as to the truth of the principal facts with which they are connected; unless they can be traced to the operation of prejudice or some other sinister motive.⁶

¹ Comp. 2 Life and Continuation, 266, and Paley's Ev. p. iii. c. 1.

² 6 Hist. of Reb. 541; 11 Lingard's Hist. of Eng. c. 1.

³ 8 Hist. of Reb. 190; 1 Rushworth's Coll. i. p. iii. 788; Mem. of Ludlow, 15.

⁴ Whitelock's Memorials, 66; Baker's Chron. 570b; 4 Hist. of Reb. 436; 7 Hume's Hist. 540, ed. 1818; 1 Godwin's Hist. of the Comm. 17.

⁵ Coxe's Mem. of Walpole, 73.

⁶ See in 4 Clarendon's Hist. 436, a remarkable instance of historical dishonesty. He states that Pym died of a loathsome disease, *morbus pediculosus*, evidently with the design of propagating the notion that it was "a mark of divine vengeance" (7 Hume's Hist. 540); whereas he must have known that his corpse was exposed to public view for several days before it was interred, in confutation of this calumnious statement. Ludlow's Mem. 31.

Still less are mere *omissions* to be considered as necessarily casting discredit upon testimony which stands in other respects unimpeached and unsuspected. "The real question," says Mr. Starkie, "must always be whether the points of variance and of discrepancy be of so strong and decisive a nature as to render it impossible, or at least difficult, to attribute them to the ordinary sources of such varieties, inattention or want of memory."¹ Omissions are generally capable of explanation by the consideration that the mind may be so deeply impressed with, and the attention so riveted to, a particular fact, as to withdraw attention from concomitant circumstances, or prevent it from taking note of what is passing. It has been justly remarked, that "upon general principles, affirmative is better than negative evidence. A person deposing to a fact, which he states he saw, must either speak truly, or must have invented his story, or it must have been sheer delusion. Not so with negative evidence; a fact may have taken place in the very sight of a person who may not have observed it; and if he did observe it, may have forgotten it."² The meteor called the Northern Lights is not recorded to have been seen in the British Islands before the commencement of the last century.³ Negative evidence is therefore regarded as of little or no weight when opposed to the positive affirmative evidence of persons of unimpeachable credit. Sometimes, however, the non-relation of particular facts amounts to the *suppressio veri*, which in point of moral guilt may be equal to positive mendacity, and destructive of all claim to testimonial credit.⁴

¹ Stark. Ev. (8th Am. Ed.) 832.

² Sir Herbert Jenner, in *Chambers v. the Queen's Proctor*, 2 Curt. 415.

³ Whately's Introd. Less. on Christ. Ev. 45.

⁴ Grafton, who was printer to Queen Elizabeth, in his *Chronicles*, published in 1562, in writing the history of King John, has made no mention of Magna Charta. Perhaps he considered that his silence might be deemed complimentary to that arbitrary princess.

CHAPTER III.

THE VALUE OF CIRCUMSTANTIAL EVIDENCE.

IN this work we have endeavored to investigate the foundations of our faith in circumstantial evidence, to ascertain its limits and its just moral effect, and to illustrate and confirm the reasonableness of the practical rules which have been established in order to prevent the unauthorized assumption of facts, and to secure to the relevant facts their proper weight. It has been maintained that circumstantial evidence is inherently of a different and inferior nature from direct and positive testimony; but that nevertheless such evidence, although not invariably so, is most frequently superior in proving power to the average strength of direct evidence; and that, under the safeguards and qualifications which have been stated, it affords a secure ground for the most important judgments in cases where direct evidence is not to be obtained. And we are able to refer, in support of this position, to the recorded views of our most distinguished jurists. The language of Mr. Justice Park is valuable here both on account of the eminence of that learned judge, and the eloquence with which his views are expressed:

“The eye of Omniscience can alone see the truth in all cases: circumstantial evidence is there out of the question; but clothed as we are with the infirmities of human nature, how are we to get at the truth without a concatenation of circumstances? Though in human judicature, imperfect as it must necessarily be, it sometimes happens, perhaps in the course of one hundred years, that in a few solitary instances, owing to the minute and curious circumstances which sometimes envelop human transactions, error has been committed from a reliance on circumstantial evidence; yet this species of evidence in the eyes of all those who are most conversant with the administration of justice, and most skilled in judicial pro-

ceedings, is much more satisfactory than the testimony of a single individual who swears he has seen a fact committed.”¹

It must, indeed, be conceded that “with the wisest laws, and with the most perfect administration of them, the innocent may sometimes be doomed to suffer the fate of the guilty; for it were vain to hope that from any human institution all error can be excluded.”² But certainty has not always been attained even in those sciences which admit of demonstration; still less can unfailing assurance be invariably expected in investigations of moral and contingent truth. Nor can any argument against the validity and sufficiency of circumstantial evidence as a means of arriving at moral certainty be drawn from the consideration that it has occasionally led to erroneous convictions, which does not equally apply as an objection against the validity and sufficiency of moral evidence of every kind; and it is believed that a far greater number of mistaken sentences have taken place in consequence of false and mistaken direct and positive testimony, than from erroneous inferences drawn from circumstantial evidence. “Admitting,” said Mr. Justice Story, “the truth of such cases, are we, then, to abandon all confidence in circumstantial evidence, and in the testimony of witnesses? Are we to declare that no human testimony to circumstances or to facts is worthy of belief, or can furnish a just foundation for a conviction? That would be to subvert the whole foundation of the administration of public justice.”³ Human imperfection is such as to render it necessary to depend upon other evidence than such as is direct.⁴ It has, at all times, been found necessary, in the intelligent administration of the law, to resort in a great measure to the force and effect of circumstances. A criminal act is commonly sought to be performed in secrecy, and an intending wrong-doer usually chooses his time, and an

¹ *Rex v. Thurtell*, Hertford Ass., Jan. 1824. These remarks have been referred to with approving comment in *People v. Jones*, 2 Wheel. Cr. C. 462, n.; *People v. Cronin*, 34 Cal. 203; *People v. Morrow*, 60 Cal. 142. The cases in the “Theory of Presumptive Proof,” collected with the object of lessening our faith in the force of Circumstantial Evidence, have been several times made the subject of judicial censure, and have been declared to be of no authority. See *People v. Videto*, 1 Park. 603.

² Romilly’s Obs. on the C. L. of England, 74.

³ Whart. Cr. L. 343.

⁴ LUDLOW, P. J., in *Com. v. Cullen*, 36 Leg. Int. 252.

occasion when most favorable to concealment, and sedulously schemes to render detection impossible. To require in such cases the production of witnesses who saw the act committed would be to defeat public justice, to deny all protection to society, to let the greatest offenders go free, the most heinous crimes remain unpunished.¹

"All evidence," to use the language of the court in an early case in this country,² "flows from persons and things. These are the only two sources from which we can expect testimony, and unless we resolve to let all secret crimes go unpunished, all civil disputes to remain undecided, and to throw away our reason, we must act upon the statements of persons and things. I say statements of things because, if we consult the experience of every hour, we will be taught that inanimate objects have voice as well as sentient beings. It is in vain, then, for man to say that, because others have failed in their efforts to detect errors, he will sit quietly down and perversely refuse to apply his intelligence to the problems of life, whether they encounter him in the counting-room or in the jury-box. He might just as well refuse to use his legs because others have fallen or been killed in walking. He might with equal propriety refuse to eat because others have been poisoned while partaking of nourishment. Some persons, admitting the force of the principle which actually compels us to act upon evidence, still insist nothing but positive testimony should produce conviction, and adhering tenaciously to this favorite dogma—those who are too timid or too weak to exercise the reasoning faculties with which kind Providence has endowed them—they assail all circumstantial evidence. A moment's reflection, however, must satisfy all candid minds of the unsoundness of such a proposition. Suppose for a moment that this was the rule of being, and that we had been so constituted that we could believe nothing unless it was demonstrated to us by our senses or by the statement of an eye-witness, what would then be our condition? Of course we could not punish any crime unless it were perpetrated in the presence of spectators. All secret murders, arson, burglaries, forgeries, and other offences could be committed with impunity. Nor would the mischief stop

¹ See remarks of GRAY, J., in *People v. Harris*, 136 N. Y. 423; *Dean v. Com.*, 32 Grat. 912; *Schoolcraft v. People*, 117 Ill. 271; *People v. Kerr*, 6 N. Y. Cr. R. 46.

² *Com. v. Twitchell*, 1 Brewst. 571.

there. Few civil controversies could be settled by juries, no book of original entries could be received in evidence, no note or obligation would avail unless there were a subscribing witness; indeed, this would not be sufficient, for, if he died before trial, the claim would expire with him, and insurance on the life of the witness would not even avoid the difficulty, for the policy would die with its attesting witness. For the same reasons all receipts would perish with those who saw them signed, and all our deeds and muniments of title would be swept away by the death of the subscribing witness, and the magistrates before whom they were acknowledged; all proof of handwriting by comparison be annihilated; commerce would be destroyed, or remitted to its infancy in barbarous ages. With the abolition of legal punishment for crime, mob law and vigilance committees would supersede the use of courts and juries. The whole framework of society would be impaired if not destroyed. The absurdity of the prejudice against circumstantial evidence may be still further illustrated by reflecting for a moment upon the use to which we constantly and properly apply it. Not only do business men answer letters, pay drafts, and credit others to the extent of millions daily upon the testimony of circumstances alone, but they commendably carry this faith, as the evidence of things unseen, into the reasoning which connects them with the world beyond our own. A trifling circumstance—the fall of an apple—has proved to the satisfaction of philosophers the great laws of gravitation which control the motion of the universe. The man who denies the existence of his Maker is properly regarded by many as thereby evincing his want of reason. Yet what proof have we of this important and accepted truth except from circumstances? The same kind of testimony is the proof of our belief in all the great truths of revelation. If we turn from the world to the great mechanism within us, we see again that no rational man pauses for one instant to doubt the force of circumstantial testimony. What evidence have we that it is a heart that beats or a brain that thinks within us, except from the fact that these organs exist in all similarly constituted beings? And we accept remedies for all the ills that flesh is heir to upon precisely the same faith as circumstantial evidence.”

Having quoted this language, Judge Parker, in a late case, said in further illustration: “You are in a telegraph office, and

see the battery in motion—a message is received. The station at the other end of the line may be a thousand miles distant. No human eye ever saw the subtle fluid pass along the wire, and yet you would hardly listen with patience to the man or the argument undertaken to reason to you that the message might have come through the air or the earth without the agency of the wire; and that all your evidence to the contrary was circumstantial and therefore unworthy of regard. In short, a scepticism like this would open wide the door for the perpetration of all secret crimes, would uproot our faith in man, and destroy even our belief in a Creator and in a future state.”¹

The legitimate consequence of the reflection that persons have been convicted and have suffered the extreme penalty of the law, on circumstantial evidence, whose innocence has been afterwards made clear, ought to be, not to produce an unreasonable and indiscriminate scepticism, but to inspire a salutary caution in the reception and estimate of such evidence, and to render the legislator especially wary how he authorizes, and the magistrate how he inflicts, punishment of a nature which admits neither of reversal nor mitigation.² Would that the total abolition of such punishment were compatible with the paramount claims of social security! It is indispensable, however, under every system, to the very existence of society, that the tribunals should act upon circumstantial evidence. And our judiciary recognize this paramount necessity in declaring that a juror should be set aside who declares his unwillingness to convict upon evidence of this kind.³ Infallibility belongs not to man; and even his strongest degree of moral assurance must be accompanied by the possible danger of mistake; but after just effect has been given to sound practical rules of evidence, there will remain no other source of uncertainty or fallacy, than that general liability to error which is necessarily incidental to all investigations founded upon moral evidence, and from which no conclusion of the human judgment in relation to questions of contingent truth, whether based upon direct or circumstantial evidence, can be absolutely and entirely exempt.

¹ Judge PARKER, in *U. S. v. Howell*, 56 Fed. R. 21.

² 1 Chitty Cr. L. 459.

³ *Cheverins v. Com.*, 8 Crim. L. Mag. 760; *People v. Ah Chung*, 54 Cal. 398; *State v. Leabo*, 89 Mo. 247.

CHAPTER IV.

CASES IN ILLUSTRATION OF THE FORCE OF CIRCUMSTANTIAL EVIDENCE.

MANY remarkable cases of this nature have been given in the preceding pages, in application to the exemplification of some specific doctrine or object. To these will now be added, as an appropriate commentary upon this discussion of the scientific principles which govern the reception and estimate of circumstantial evidence, some of the most curious and instructive examples of the force of a cumulation of moral and mechanical facts which are to be found in the annals of criminal jurisprudence.

In the autumn of 1786, a young woman, who lived with her parents in a remote district in Kirkcudbright, was one day left alone in the cottage, her parents having gone out to the harvest-field. On their return home a little after midday they found their daughter murdered, with her throat cut in a most shocking manner. The circumstances in which she was found, the character of the deceased, and the appearance of the wound, all concurred in excluding any presumption of suicide; while the surgeons who examined the wound were satisfied that it had been inflicted by a sharp instrument, and by a person who must have held the instrument in his left hand. Upon opening the body the deceased appeared to have been some months gone with child; and on examining the ground about the cottage, there were discovered the footsteps of a person who had seemingly been running hastily from the cottage, by an indirect road through a quagmire or bog in which there were stepping-stones. It appeared, however, that the person in his haste and confusion had slipped his foot and stepped into the mire, by which he must have been wet nearly to the middle of the leg. The prints of the footsteps were accurately measured, and an exact impression taken of them; and it appeared that they

were those of a person who must have worn shoes the *soles* of which had been newly mended, and which, as is usual in that part of the country, had iron knobs or nails in them. There were discovered also, along the track of the footsteps, and at certain intervals, drops of blood; and on a stile or small gateway near the cottage, and in the line of the footsteps, some marks resembling those of a hand which had been bloody. Not the slightest suspicion at this time attached to any particular person as the murderer, nor was it even suspected who might be the father of the child of which the girl was pregnant. At the funeral a number of persons of both sexes attended, and the steward-depute thought it the fittest opportunity of endeavoring if possible to discover the murderer; conceiving rightly that to avoid suspicion, whoever he was, he would not on that occasion be absent. With this view, he called together after the interment the whole of the men who were present, being about sixty in number. He caused the shoes of each of them to be taken off and measured; and one of the shoes was found to resemble, pretty nearly, the impression of the footsteps near to the cottage. The wearer of the shoe was the schoolmaster of the parish, which led to a suspicion that he must have been the father of the child, and had been guilty of the murder to save his character. On a closer examination, however, of the shoe, it was discovered that it was pointed at the toe, whereas the impression of the footstep was round at that place. The measurement of the rest went on, and after going through nearly the whole number, one at length was discovered which corresponded exactly with the impressions in dimensions, shape of the foot, form of the sole, and the number and position of the nails. William Richardson, the young man to whom the shoe belonged, on being asked where he was the day the deceased was murdered, replied, seemingly without embarrassment, that he had been all that day employed at his master's work, a statement which his master and fellow-servants, who were present, confirmed. This going so far to remove suspicion, a warrant of commitment was not then granted; but some circumstances occurring a few days afterwards, having a tendency to excite it anew, the young man was apprehended and lodged in jail. Upon his examination he acknowledged that he was *left-handed*; and some scratches being observed on his cheek, he said he had got

them when pulling nuts in a wood a few days before. He still adhered to what he had said of his having been on the day of the murder employed constantly at his master's work, at some distance from the place where the deceased resided ; but in the course of the inquiry it turned out that he had been absent from his work about half an hour (the time being distinctly ascertained) in the course of the forenoon of that day ; that he called at a smith's shop, under the pretence of wanting something, which it did not appear he had any occasion for ; and that this smith's shop was in the way to the cottage of the deceased. A young girl, who was some hundred yards from the cottage, said that about the time the murder was committed (and which corresponded to the time that Richardson was absent from his fellow-servants) she saw a person exactly with his dress and appearance running hastily toward the cottage, but did not see him return, though he might have gone round by a small eminence which would intercept him from her view, and which was the very track where the footsteps had been traced. His fellow-servants now recollected that in the forenoon of that day they were employed with Richardson in driving their master's carts ; and that when passing by a wood, which they named, he said that he must run to the smith's shop and would be back in a short time. He then left his cart under their charge ; and having waited for him about half an hour, which one of the servants ascertained by having at the time looked at his watch, they remarked on his return that he had been longer absent than he said he would be, to which he replied that he stopped in the wood to gather some nuts. They observed at this time one of his stockings wet and soiled as if he had stepped into a puddle ; on which they asked where he had been. He said he had stepped into a marsh, the name of which he mentioned ; on which his fellow-servants remarked, " that he must have been either mad or drunk if he had stepped into that marsh, as there was a footpath which went along the side of it." It then appeared, by comparing the time he was absent with the distance of the cottage from the place where he had left his fellow-servants, that he might have gone there, committed the murder, and returned to them. A search was then made for the stockings he had worn that day, which were found concealed in the thatch of the apartment where he

slept, and appeared to be much soiled, and to have some drops of blood on them. The last he accounted for by saying, first, that his nose had been bleeding some days before ; but it being observed that he had worn other stockings on that day, he said he had assisted in bleeding a horse ; but it was proved that he had not assisted, and had stood at such a distance that the blood could not have reached him. On examining the mud or sand upon the stockings, it corresponded precisely with that of the mire or puddle adjoining to the cottage, which was of a very particular kind, none other of the same kind being found in that neighborhood. The shoemaker was then discovered who had mended his shoes a short time before, and he spoke distinctly to the shoes of the prisoner, which were exhibited to him, as having been those he had mended. It then came out that Richardson had been acquainted with the deceased, who was considered in the county as of weak intellect, and had on one occasion been seen with her in a wood, in circumstances that led to a suspicion that he had had criminal intercourse with her ; and on being taunted with having such connection with one in her situation, he seemed much ashamed and greatly hurt. It was proved further, by the person who sat next to him when his shoes were measuring, that he trembled much, and seemed a good deal agitated ; and that in the interval between that time and his being apprehended he had been advised to fly, but his answer was, "Where can I fly to?" On the other hand, evidence was brought to show that, about the time of the murder, a boat's crew from Ireland had landed on that part of the coast, near to the dwelling of the deceased ; and it was said that some of the crew might have committed the murder, though their motives for doing so it was difficult to explain, it not being alleged that robbery was their purpose, or that anything was missing from the cottages in the neighborhood. The prisoner was tried at Dumfries, in the spring of 1787, and the jury by a great plurality of voices found him guilty. Before his execution he confessed that he was the murderer ; and said it was to hide his shame that he committed the deed, knowing that the girl was with child by him. He mentioned also to the clergyman who attended him where the knife would be found with which he had perpetrated the murder ; and it was found accordingly, in the place

he described, under a stone in a wall, with marks of blood upon it.¹

The casual discovery of circumstances which indicated the existence of a powerful *motive* to commit the deed, the facts, that it had been committed by a *left-handed* man, as the prisoner was, thus narrowing the range of inquiry, and that there was an interval of absence which afforded the prisoner the necessary *opportunity* of committing the crime, his false assertion that he had not been absent from his work on that day, contradicted as it was by witnesses who saw him on the way to and in the vicinity of the scene of the murder, amounting to an admission of the relevancy and weight of that circumstance if uncontradicted, the discovery of his footsteps near the spot, his agitation at the time of the admeasurement and comparison of his shoes with the impressions, the discovery of his secreted stockings, spotted with blood, and soiled with mire peculiar to the vicinity of the cottage, the scratches on his face, his various contradicted statements, all these particulars combine to render this a most satisfactory case of conviction, and to exemplify the high degree of assurance which circumstantial evidence is capable of producing.

A man named *Patch* had been received by Mr Isaac Blight, a ship-breaker, near Greenland Dock, into his service in the year 1803. Mr. Blight having become embarrassed in his circumstances in July, 1805, entered into a deed of composition with his creditors; and in consequence of the failure of this arrangement he made a colorable transfer of his property to the prisoner. It was afterwards agreed between them, that Mr. Blight was to retire nominally from the business, which the prisoner was to manage, and the former was to have two-thirds of the profits, and the prisoner the remaining third, for which he was to pay £1,250. Of this amount, £250 was paid in cash, and a draft was given for the remainder upon a person named Goom, which would become payable on the 16th of September; the prisoner representing that he had received the purchase-money of an estate and lent it to Goom. On the 16th of September the prisoner represented to Mr. Blight's bankers that Goom could not take up the bill, and withdrew it, substituting his own draft upon Goom, to fall due on the 20th of September. On the 19th of September Mr. Blight went to

¹ *Rex v. Richardson, Burnett's C. L.*

visit his wife at Margate, and the prisoner accompanied him as far as Deptford, and then went to London, and represented to the bankers that Goom would not be able to face his draft, but that he had obtained from him a note which satisfied him, and therefore they were not to present it. The prisoner boarded in Mr. Blight's house, and the only other inmate was a female servant, whom, about eight o'clock on the same evening (the 19th), he sent out to procure some oysters for his supper. During her absence a gun or pistol ball was fired through the shutter of a parlor fronting the Thames, where the family, when at home, usually spent their evenings. It was low water, and the mud was so deep that any person attempting to escape in that direction must have been suffocated; and a man who was standing near the gate of the wharf, which was the only other mode of escape, heard the report, but saw no person. From the manner in which the ball had entered the shutter, it must have been discharged by some person who was close to the shutter; and the river was so much below the level of the house, that the ball, if it had been fired from thence, must have reached a much higher part than that which it struck. The prisoner declined the offer of the neighbors to remain in the house with him that night. On the following day he wrote to inform Mr. Blight of this transaction, stating his hope that the shot had been accidental, that he knew of no person who had any animosity against him, that he wished to know for whom it was intended, and that he should be happy to hear from him, but much more so to see him. Mr. Blight returned home on the 23d of September, having previously been to London to see his bankers on the subject of the £1,000 draft. Upon getting home, the draft became the subject of conversation, and Mr. Blight desired the prisoner to go to London and not to return without the money. Upon his return from London, the prisoner and Mr. Blight spent the evening in the *back* parlor, a different one from that in which the family usually sat. About eight o'clock the prisoner went from the parlor into the kitchen, and asked the servant for a candle, complaining that he was disordered. The prisoner's way from the kitchen was through an outer door which fastened by a spring lock, and across a paved court in front of the house, which was enclosed by palisadoes, and through a gate over a wharf, in front of that court, on which there was

the kind of soil peculiar to premises for breaking up ships, and then through a counting-house. All of these doors, as well as the door of the parlor, the prisoner left open, notwithstanding the state of alarm excited by the shot. The servant heard the privy-door slam, and almost at the same moment saw the flash of a pistol at the door of the parlor where the deceased was sitting, upon which she ran and shut the outer door and gate. The prisoner immediately afterwards rapped loudly at the door for admittance, with his clothes in disorder. He evinced great apparent concern for Mr. Blight, who was mortally wounded and died on the following day. From the state of the tide, and from the testimony of various persons who were on the outside of the premises, no person could have escaped from them. In consequence of this event Mrs. Blight returned home, and the prisoner, in answer to an inquiry about the draft which had made her husband so uneasy, told her that it was paid, and claimed the whole of the property as his own. Suspicion soon fixed upon the prisoner, and in his sleeping-room was found a pair of stockings rolled up like clean stockings, but with the feet plastered over with the sort of soil found on the wharf, and a ramrod was found in the privy. The prisoner usually wore boots, but on the evening of the murder he wore shoes and stockings. It was supposed that, to prevent alarm to the deceased or the female servant, the murderer must have approached without his shoes, and afterwards gone on the wharf to throw away the pistol into the river. All the prisoner's statements as to his pecuniary transactions with Goom and his right to draw upon him, and the payment of the bill, turned out to be false. He attempted to tamper with the servant-girl as to her evidence before the coroner, and urged her to keep to one account; and before that officer he made several inconsistent statements as to his pecuniary transactions with the deceased, and equivocated much as to whether he wore boots or shoes on the evening of the murder, as well as to his ownership of the soiled stockings, which, however, were clearly proved to be his, and for the soiled state of which he made no attempt to account. The prisoner suggested the existence of malicious feelings in two persons with whom the deceased had been on ill terms; but they had no motive for doing him any injury, and it was clearly proved that upon both occasions of attack they were at a distance.

The prisoner's motive was to possess himself of the business and property of his benefactor; and to all appearance his falsehoods and duplicity were on the point of being discovered. His apparent incaution on the evening of the murder could be accounted for after the preceding alarm by no other supposition than that it was the result of premeditation, and intended to afford facilities for the execution of his dark purposes. The direction of the first ball through the shutter excluded the possibility that it had been fired from any other place than the deceased's own premises; and by a singular concurrence of circumstances, it was clearly proved that no person escaped from the premises after either of the shots, so that suspicion was necessarily restricted to the persons on the premises. The occurrence of the first attack during the temporary absence of the servant (that absence contrived by the prisoner himself), the discovery of a ramrod in the very place where the prisoner had been, and of his soiled stockings folded up so as to evade observation, his interference with one of the witnesses, his falsehoods respecting his pecuniary transactions with Goom and with the deceased, and his attempts to exonerate himself from suspicion by implicating other persons, all these cogent circumstances of presumption tended to show, not only that the prisoner was the only person who had any motive to destroy the deceased, but that the crime could have been committed by no other person; and while all the facts were naturally explicable upon the hypothesis of his guilt, they were incapable of any other reasonable solution. The prisoner was convicted and executed.¹

A respectable farmer, who had been at Stourbridge market on the 18th of December, left that place on foot a little after four in the afternoon, to return home, a distance of between two and three miles. About half a mile from his own house he was overtaken by a man, who inquired the road for Kidderminster, and they walked together for two or three hundred yards, when the stranger drew behind and shot him in the back, and then robbed him of about eleven pounds in money and a silver watch. After lingering ten days, he died of the wound thus received. The wounded man noticed that the pistol was long and very bright, and that the robber had on

¹ Surrey Spring Ass., 1806, coram L. C. B. MACDONALD. Gurney's Short-hand Report.

a dark-colored great-coat, which reached down to the calves of his legs. Several circumstances of correspondence with the description given by the deceased conspired to fix suspicion upon the prisoner, who for about fourteen months had worked as a carpenter at Ombersley, seventeen miles from Stourbridge. It was discovered that he had been absent from that place from the 17th to the 22d of December; that on the 23d he had taken two boxes, one containing his working-tools and the other his clothes, to Worcester, and there delivered them to a carrier, addressed to John Wood, at an inn in London, to be left till called for, the name by which he was known being William Howe; and that on the 25th he finally left Ombersley, and went to London. Upon inquiry at the inn to which the boxes were directed, it was found that a person answering the description of the prisoner had removed them in a meal-man's cart to the Bull in Bishopsgate Street, and that on the 5th of January they had been removed from thence in a cooper's cart. Here all trace of the boxes seemed cut off; but on the 12th of January the police officers succeeded in tracing them to a widow woman's house, in a court in the same street; when, upon examining the box which contained the prisoner's clothes, they found a screw-barrel pistol, a pistol-key, a bullet-mould, a single bullet, a small quantity of gunpowder in a cartridge, and a fawn-skin waistcoat; which latter circumstance was important, as the prisoner was seen in Stourbridge on the day of the murder, dressed in a waistcoat of that kind. By remaining concealed in the woman's house the police were enabled to apprehend the prisoner, who called there the following night. Upon his apprehension, he denied that he had ever been at Stourbridge, or heard of the deceased being shot; and he accounted for changing his name at Worcester, by stating that he had had a difference with his fellow work-people, and afterwards that he did it to prevent his wife, whom he had determined to leave, from being able to follow him. On being asked where he was on the 18th of December, he said he believed at Kidderminster, a town about six miles from Stourbridge. Upon the prisoner's subsequent examination before the magistrates, he stated that he was at Kidderminster on the 17th of December, and at Stourbridge on the 18th (the day of the murder), but that he was not out of the latter town from the time of his arrival there, at one o'clock in the afternoon, until half-past seven the

following morning; that on the afternoon he went to look about the town for lodgings, and ultimately went to his lodgings about six o'clock in the evening. The account which the prisoner thus gave of himself was proved to be a tissue of falsehoods. He had been seen by several witnesses between four and five in the afternoon of the day in question, on the road leading from Stourbridge toward, and not far from, the spot where the deceased was shot, and about half-past five he was seen going in great haste in the opposite direction, toward Stourbridge. He afterwards called at two public-houses at Stourbridge, at the first of them about six o'clock, and at the other about nine the same evening; at both of which the attack and robbery were the subjects of conversation, in which the prisoner joined; and he was distinctly spoken to as having worn a fawn-skin waistcoat. On the 21st of December the prisoner sold a watch of which the deceased had been robbed, at Warwick, stating it to be a family watch. But the most conclusive circumstance was, that a letter was sent by the prisoner, while in jail, to his wife, who, being herself unable to read, had got a neighbor to read it to her, which contained a direction to remove some things concealed in a rick near Stourbridge; where, upon search being made, were discovered a glove, containing three bullets, and a screw-barrel pistol, the fellow to that found in the prisoner's box. A gunmaker deposed that the bullet extracted from the wound had been discharged from a screw-barrel pistol, such as that produced, and that that bullet and the bullet found in the prisoner's box had been cast in the same mould.

The prisoner's denial, on his apprehension, that he had ever been at Stourbridge, or heard of the act, though he had been seen near the spot about the time when the shot was fired, denoted a consciousness of the fatal effect of any evidence tending to establish the fact of his presence there. The discovery of a fawn-skin waistcoat in his possession, corresponding with that worn by him when seen at Stourbridge on the evening of the murder, his possession and disposal of the deceased's watch within three days after he had delivered it to his murderer, his false statement that it was a family watch, the correspondence between the weapon found in the rick and that found in the prisoner's box, and between the bullet extracted from the wound and that found in the same box, and

the peculiarity that the deceased had been killed by a wound from a screw-barrel pistol,—all these circumstances placed the guilt of the prisoner beyond any reasonable doubt, and there was no possibility of referring them to casual and accidental coincidence, or of explaining them upon any hypothesis compatible with his innocence. He was convicted and before his execution confessed his guilt.¹

Three men, named *Smith*, *Varnham*, and *Timms*, were tried before Mr. Justice Coltman, at the Norfolk Spring Assizes, 1837, for the murder of Hannah Mansfield, on Tuesday the 3d of January preceding. The deceased, who was about forty years of age, lived alone in a cottage at Denver, on the border of a common, at a distance from the turnpike-road leading from Hilgay through Denver to Downham, and remote from any other house, except an adjoining cottage under the same roof, occupied by a laborer and his family. The deceased had acquired some repute as a fortune-teller, for which purpose she kept by her some money, which she called her bright money; and she possessed a quantity of plate, consisting of cream jugs, table and tea-spoons, sugar-tongs, salt-cellars, and a silver tankard, which she kept in a corner cupboard and had frequently boastfully displayed. She spent the evening preceding the murder at her neighbor's house, which she left about half-past eleven; her neighbor's wife, being engaged in washing, did not go to bed till one o'clock, when she disturbed her husband, who, as he lay awake, about two o'clock, heard a noise in the deceased's cottage, but hearing nothing further, went to sleep again. About ten o'clock the following morning the poor woman was found dead in her cottage, with her throat cut from ear to ear; the cottage door had been split open by some violent effort, and the cottage had been robbed of her money and treasure. The footsteps of two men were traced from the turnpike-road towards the deceased's house, and from the house into the stackyard, and back again to the footpath, and across the common to a run of water, and thence to the turnpike-road: one of the footsteps was very large, and peculiarly shaped and nailed, there being four nailmarks in the centre of the heel, in a line from back to front, and two on each side; and there were nailmarks also in the waist of the heel, between the sole and the heel,

¹ Stafford Spring Ass., 1813, coram Mr. Justice BAYLEY.

and the sole was very full of nailmarks. The prisoner Timms's shoes exactly corresponded with these marks; the other footstep was a smaller one, and full of such marks. The large footmark proceeding from the house had marks of blood, and the smaller footstep was on the other side of the path, and the centre of the path was so hard and beaten that a third person might have walked on it without leaving any impression. Only the larger footstep was traced to the stackyard, but both footsteps were traced in a direction toward and from the house. There was also the footstep of a third person, who appeared to have been stationed for the purpose of watching the back door of the adjoining cottage. The three prisoners had worked in the neighborhood as excavators, a few months before the murder; and about twelve months previously, the prisoner Smith, in company with two other men, had called at the adjoining cottage, and asked if Hannah Mansfield was at home, supposing that to be her cottage, stating that he had lost some tools, about which he wished to consult her. They had been loitering at various low public houses in the neighborhood of the deceased's cottage for several days preceding the murder, and left one of those public houses, about two miles from her residence, where they had spent the evening, about eleven o'clock on the night of the murder. Three men, corresponding in appearance with the prisoners, one of whom was identified as the prisoner Timms, were met on the following morning about three o'clock, a mile from the deceased's house, walking very fast along the road from Denver to Downham; and about half-past eight the same morning the same three men were seen at Leverington, fourteen miles from Denver, apparently fatigued, and the pocket of one of them stuffed with something bulky. At Sutton St. Edmunds, about twenty miles from Denver, the prisoners stopped at a public house to refresh themselves, and one of them paid away a very bright and unworn sixpence and shilling of the year 1817. After having stayed some hours, they proceeded to Whaplode Drove, where they remained at a public house for several days, and fell into company with a shoemaker, who made two pairs of boots for Varnham and Smith, for which Timms paid in a half-sovereign, a half-guinea, and a sixpence. Varnham cut the tops from his old boots, and the landlord's wife burned the soles, and threw the clates upon an ash-heap, where they were after-

wards found by a police officer, and they exactly fitted one of the impressions made in the snow near the cottage. While sitting by the fireside one evening at this public house, the prisoner Smith laid hold of the bottom of his pocket, which seemed heavy, and a bundle contained in a silk handkerchief dropped out, from which some tea-spoons, a pair of sugar-tongs, and some glass fell on the floor; the glass was broken, the other things he hastily collected and replaced. On the following day the prisoner Timms called upon the shoemaker, who had been present on the previous evening, professedly to talk about the boots which he had to make, and took occasion to remark, that "he need not say anything about what he had seen, as it might get the landlord into a scrape, though for themselves they did not care about it, as they had got the things from Lisbon." On the Saturday following the prisoners were traced to Whittlesea, where they offered for sale to a gunmaker a mass of molten silver, upwards of two pounds' weight, which the prisoner Timms said had consisted of spoons, salt-cellars, and elegant things fit for any table, a description corresponding with the deceased's plate; and they offered to purchase a pair of pistols. The silver was cut by the person to whom it was offered into six or seven pieces, and offered by him for sale to another person; but not having succeeded in disposing of it, they gave his wife in return for his trouble a small strip of it, weighing about an ounce, and three keys, which were afterwards identified as having belonged to the deceased. The prisoners were then traced to and apprehended at Doncaster. To the officers they gave false accounts of themselves. Stains of blood were found upon some parts of the clothes of all the prisoners, and the clothes of two of them appeared to have been washed in order to remove stains. On the person of Smith were found several pounds in money, a picklock key, lucifer matches, and a knife on which was some coagulated blood; and on the person of Timms was found, wrapped up in a piece of linen, a mass or wedge of molten silver. With several of their fellow-prisoners Smith and Varnham conversed upon the subject of this cruel action in language of disgusting coarseness and brutality; which implied guilty knowledge of and participation in the crime, since they expressed confidence of security if their companions remained silent, as nobody had seen them go to the house.

The knowledge which the prisoners possessed of the locality of the deceased's cottage, and of her character and circumstances, their presence in the vicinity at so suspicious an hour, in the inclement season of mid-winter, so close upon the time when the deceased was murdered, their subsequent wanderings, apparently without any object, their profuse expenditure of money, their apparently wanton destruction of valuable articles of apparel, unaccountable except on the supposition that they were the pregnant evidences of guilt, their possession of so much money and molten silver when apprehended, the correspondence of the shoe-marks about the cottage with the shoes of two of the prisoners, and the possession of the deceased's keys,—the concurrence of these otherwise inexplicable facts could not be rationally accounted for except by the conclusion of the guilt of the prisoners, who made a full confession, two of whom, Smith and Timms, were executed.

A foreigner, named *Courvoisier*, was tried at the Central Criminal Court in London for the murder of Lord William Russell, an elderly gentleman, seventy-five years of age, a widower, who lived in Norfolk Street, Park Lane. The deceased's family consisted of the prisoner, who had been in his service as valet about five weeks, and of a housemaid and cook, who had lived with him three years, beside a coachman and groom who did not live in the house. On the 6th of May the female servants went to bed as usual, and the housemaid on going to bed lighted a fire and set a rushlight in her master's bedroom, which presented its usual appearance; the prisoner remained sitting up to warm his bed. The housemaid rose about half-past six on the following morning, and on going downstairs knocked, as usual, at the prisoner's door. At her master's door she noticed the warming-pan, which was usually taken downstairs; on going into a back drawing-room she found the drawers of her master's desk open, his bunch of keys lying on the carpet, and a screw-driver lay on a chair. In the hall his lordship's cloak was found neatly folded up, together with a bundle, containing a variety of valuable articles, most of them portable, such as a thief would ordinarily put in his pocket instead of deliberately packing up. In the dining-room she found several articles of plate scattered about. The street-door, though shut, was unfastened, but the testimony of the police, who passed the house many times in the night, rendered

it very unlikely that any person had left it in that direction. Alarmed by these appearances, the housemaid called the prisoner, and found him dressed, though only a few moments had elapsed since she had knocked at his door, which was a much shorter time than he usually took to dress. They went together downstairs; and after examining the state of the dining-room and the prisoner's pantry, where the cupboard and drawers were all found opened, they proceeded to their master's bedroom, where he was found with his throat cut, in a manner which must have produced instant death. His lordship usually placed his watch and rings on his dressing-table; but they had been taken away, and his note-cases, in one of which the prisoner stated that he had seen a £10 and a £5 note a few days before, were open and emptied of their contents. A book was found on the floor, and his lordship's spectacles lay upon it, and there was a candlestick about four or five feet from the bed with a candle burned to the socket. These articles appeared to have been so placed to create the impression that his lordship had been murdered while reading; but he was not accustomed to read in bed, and only so much of the rushlight was burned as would have been consumed in about an hour and a half, though the candle was completely burned away. The prisoner stated that he left his master reading. Upon the door of the prisoner's pantry, leading to a back area, were marks as if it had been broken into, and the prisoner suggested that the thieves had entered by that door; but they appeared to have been made from within, and none of them had been made by the application of sufficient force to break open the door; the bolts appeared not to have been shot at the time, and the socket of one of them had been wrenched off when the door was open. The marks on this door appeared to have been made with a bent poker found in the pantry. It was clear that no person had entered the premises from the rear, since in one direction they could have been approached only by passing over a wall covered with dust, which would have retained the slightest impression; and on the other, the party must have passed over some tiling which was so old and perished as necessarily to have been damaged by the passing of any person over it; while from the testimony of the police it was equally clear that no person had escaped through the front door. For several days the missing articles

could not be found, and the case appeared to be wrapped in impenetrable mystery; but at length, upon a stricter search, his lordship's rings and Waterloo medal, five sovereigns, and a £10 note, the latter of which had been removed from his note-case, were found concealed behind the skirting-board in the prisoner's pantry; and beneath the leaden covering of a sink was found his lordship's watch, and several other articles were also found in other parts of the same room. But a quantity of plate which had been stolen still remained undiscovered, notwithstanding the most diligent efforts to discover it; and its non-production was the only circumstance which gave any apparent countenance to the possibility that the house had been robbed on the night of the murder, by parties who had escaped. The mystery was cleared up, however, in a very extraordinary manner during the progress of the trial. About a fortnight before the murder, the prisoner had left a parcel in the care of a hotel-keeper with whom he had formerly lived as waiter, whose curiosity was excited to examine its contents by reading in a newspaper a suggestion that, as the prisoner was a foreigner, he had probably left the plate at one of the foreign hotels in London. The parcel was found to contain the missing plate. The prisoner had been known in this situation only by his Christian name, which circumstance accounted for the fact that suspicion had not been sooner excited by the account of the murder and robbery which had appeared in the daily journals. This discovery, in conjunction with the simulated appearances of external violence and robbery, and the conclusive evidence that the premises had not been entered from without, made it certain that the robbery of the plate and the murder had been committed by one of the inmates; while the manner and place of concealment, and the artless and satisfactory account given by the female servants, rendered it equally clear that the prisoner, and he alone, could have been the perpetrator of this cruel action. He made a confession of his guilt, and was executed pursuant to his sentence.¹

How was accused of the murder of one Church, and the evidence relied on for conviction was wholly circumstantial. The deceased had been called out of bed at one o'clock in the morning by a person pretending to have a letter for him, and as he opened the door was shot dead on the spot. The following

¹ Sessions Papers, 1840; 2 Townsend's St. Tr. 244.

facts are set forth by the reporter as having been developed on the trial: The prisoner had, on various occasions, complained that Church had defrauded him of his property, and had threatened to avenge himself. On one occasion he had gone so far as to threaten to take the life of the deceased, and had endeavored to persuade a person to lend him aid in putting Church out of the way. On the night of the crime the accused left a village a few miles distant from the deceased's residence, in time to have committed the murder, and at the time of leaving had something under his coat which bore the appearance of a rifle. On the morning after the murder the horse which the prisoner rode the evening before was found wet with sweat, and the prisoner made false statements about the horse being sick. The ball with which the fatal wound was inflicted on the deceased was almost identical in weight with the balls found with the prisoner's rifle; and the patch and wadding found near where the deceased fell were similar to those in the prisoner's rifle-box. The prisoner was convicted, and while he was awaiting execution, made a circumstantial confession.¹

The recent case of *People v. Johnson*² affords a good illustration. The death by violence was established by direct evidence, and the dead body with marks of murder upon it had been found. The defendant appealed from a judgment of conviction on the ground that the evidence (circumstantial) upon which the verdict had been rendered was inconclusive. The Court of Appeals, in sustaining the conclusion of the jury, set out the following comprehensive statement of the incriminating facts:

"A sufficient and adequate motive for the crime, consisting of revenge for a supposed injury, and supplemented by a desire to obtain the money known to have been paid to the deceased and which was stolen from his person, a convenient and presumably safe opportunity arising from the prisoner's familiarity with the premises, his knowledge of a place in which to hide until all the occupants of the building had departed after their usual habit, and leaving the engineer alone and unprotected while closing the premises and preparing for his own departure; the presence of the tools and instruments sufficient to effect the killing, the existence and locality of which were well known to the prisoner, and which were found near by with

¹ 2 Wheel. Cr. Cas. 410.

² 140 N. Y. 350.

blood and hair upon them ; the track of the murderer from the basement to the washing closet on the fourth floor, shown by the bloody finger-marks on the doors passed in the ascent, and the stains upon the towel used in an effort to efface the marks which the struggle had left upon him ; the theft of the black trousers left on the same floor, and which, on the next day, were found in the possession of the prisoner, who sought to dispose of them to others ; his display immediately after the killing of an amount of money, and in denominations closely corresponding to that which was taken from the pockets of the deceased, coupled with the fact that before the killing the prisoner was penniless, unable to pay his rent, borrowing small sums where he could, out of work and earning nothing, and pawning his clothing to relieve his want ; his manifest falsehood as to the source from which he obtained the money ; his effort to frame and prove a false defence of absence in New Jersey on the day of the homicide ; the blood stains on the clothing and shoes he wore that day ; his attempt to avoid and escape arrest when the crime became known and suspicion aroused ; the fact that while offering himself as a witness and protesting with a vehemence almost amounting to blasphemy that he was innocent, he nevertheless gave no explanation of his possession of the stolen trousers, or of the money which he had displayed, but remained utterly silent where explanation was easy and imperative if innocence existed."

The remarkable case of *Udderzook v. Com.*¹ showed a combination of two to cheat insurance companies, and the murder of one by the other to reap the fruit of the fraud.

W. S. Goss, an inhabitant of Baltimore, had insured his life to the amount of \$25,000. He was last seen at his shop, near Baltimore, on the evening of February 2d, 1872, in company with W. E. Udderzook, his brother-in-law, the prisoner, and a young man living near. Shortly after the two had left the deceased to go to the house of the prisoner's father, the shop was discovered to be on fire. After it had burned down, a body was drawn out of the fire, supposed to be that of Goss. Claims were made on the insurance companies which the prisoner was active in prosecuting. On the 30th of June, 1873, the prisoner and a stranger, a man identified as A. C. Wilson, appeared at Jennerville, in Pennsylvania, and remained over night

¹ 76 Pa. St. 340.

and the next day. On the evening of July 1st, the two left the town together in a buggy. Next day, on being met and asked what had become of his companion, the prisoner said he had left him at Parkesburg. On the 11th July, the body of a man identified as W. S. Goss or A. C. Wilson was found in a stretch of woods about ten miles from Jennerville. The head and trunk were buried in a shallow hole in one place and the arms and legs in another. The stranger who was with the prisoner at Jennerville, identified as A. C. Wilson, was traced from place to place, living in retirement from June 22, 1872, until within a few days of the time when he appeared with the prisoner at Jennerville. During the interval the prisoner and Wilson were seen together several times under circumstances indicating great intimacy and privacy. Wilson was not seen or heard from subsequent to the time when he left Jennerville in company with the prisoner. The great question in the case was the identity of A. C. Wilson and W. S. Goss. This was established by a variety of circumstances, leaving no doubt that Goss and Wilson were the same person, and that the body found in the woods was that of Goss. A photograph of Goss taken in Baltimore was introduced and presented to a witness, who, so far as he knew, had never seen Goss, but had seen a man named Wilson, and was declared by him to be the photograph of Wilson. There were letters from Wilson, identified as being in the handwriting of Goss. Wilson wore a peculiar ring which belonged to Goss. Wilson had at one time recognized A. C. Wilson as his brother. Packages addressed to W. S. Goss, and envelopes bearing the mark of the firm with which Goss had been employed, came and went to and from Baltimore. There was also evidence that Wilson and Goss were both in the habit of becoming intoxicated. Other circumstances there were which pointed to the one conclusion. Altogether the facts were most convincing, and left no room to doubt that W. S. Goss and A. C. Wilson were one and the same person. This being established, it was equally clear that Udderzook had done away with his accomplice in the fraud, to secure to himself the whole proceeds thereof, and to make it impossible for any witness to jeopardize the possession of his ill-gotten gains. Accordingly the prisoner was convicted and suffered the full penalty of the law.

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